279 N.C. App.—No. 2 Pages 109-260

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 29, 2022

MAILING ADDRESS: The Judicial Department
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OF

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[1]Resigned 19 November 2021.
[2]Began 7 October 2021.

COURT OF APPEALS

CASES REPORTED

FILED 7 SEPTEMBER 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory appeal—granted motion to dismiss for lack of personal jurisdiction—In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, plaintiff's interlocutory appeal from an order granting defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction was immediately appealable under N.C.G.S. § 1-277(b) and because motions to dismiss for lack of personal jurisdiction affect a substantial right. **Cohen v. Cont'l Motors, Inc., 123.**

Preservation of issues—fatal variance between indictment and evidence—motion to dismiss based on sufficiency of evidence—In a drug prosecution, without deciding whether defendant's motion to dismiss for insufficient evidence was adequate to preserve for appellate review his argument that a fatal variance existed between the indictment that charged defendant with resisting a public officer and the evidence presented, the Court of Appeals employed de novo rather than plain error review to resolve the fatal variance issue. **State v. Tarlton, 249.**

argued was exempt from CON review as a legacy medical care facility—the determination by the Department of Health and Human Services that N.C.G.S. § 131E-184(h) required the applicant to first acquire legal ownership of the facility before obtaining a CON constituted a reasonable statutory interpretation within the agency's authority (in particular, of the phrase "acquire or reopen"). Where the administrative law judge (ALJ) failed to defer to the agency's decision when it ordered the agency to transfer the previously-issued CONs to the applicant, its decision was reversed and the matter remanded for entry of summary judgment in favor of the agency and the facility's current owner. **FMSH L.L.C. v. N.C. Dep't of Health & Hum. Servs., 157.**

INDICTMENT AND INFORMATION

Fatal variance—resisting a public officer—basis for arrest immaterial—In a drug prosecution, there was no fatal variance between the indictment charging defendant with resisting a public officer, which stated defendant was being arrested for processing narcotics, and the evidence at trial, which showed defendant was found to possess marijuana before he ran away from officers, because the specific basis for the arrest was not an essential element of the offense and was therefore immaterial. The evidence identifying the officer's official duty as lawfully trying to take defendant into custody—an essential element—conformed to the allegations in the indictment. **State v. Tarlton, 249.**

JURISDICTION

Personal—lack of—defense raised in responsive pleading—no waiver—In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, defendant did not waive its challenge to personal jurisdiction by allowing roughly three years to pass since plaintiff filed the complaint or by participating in limited discovery pertaining solely to the personal jurisdiction issue. Rather, defendant preserved its defense of lack of personal jurisdiction by raising it in its answer to plaintiff's complaint, pursuant to Civil Procedure Rule 12. **Cohen v. Cont'l Motors, Inc., 123.**

Personal—specific—purposeful availment—foreign aircraft parts manufacturer—serving a North Carolina market—In an action brought against an out-of-state aircraft components manufacturer (defendant) after two North Carolina residents (decedents) died in a plane crash in North Carolina, the trial court erred in granting defendant's motion to dismiss for lack of personal jurisdiction. Defendant directly sold aircraft parts to a North Carolina-based maintenance servicer through an independent distributor in North Carolina, including the engine starter adapter that allegedly caused the crash and that another out-of-state company overhauled and sent back to the maintenance servicer, which then installed the adapter into decedents' private plane based on instructions that defendant directly provided in exchange for a subscription fee. Taken together, the facts indicated that defendant was actively serving a North Carolina market (albeit indirectly) for its products and, therefore, purposefully availed itself of the privileges of conducting activities in North Carolina. **Cohen v. Cont'l Motors, Inc., 123.**

Public utility regulation—proposed business plan—advisory opinion—no actual controversy—Where the owner of hydroelectric generation facilities did not present a justiciable controversy when it sought a declaratory ruling from the North Carolina Utilities Commission that its proposed business plan—involving land it did not yet own and contracts it had not yet signed—fell within the landlord/ tenant

Presumption of regularity—severity of sentence—no improper considerations—At the sentencing phase of an impaired driving prosecution, where defendant's sentence fit within the statutory limit and was therefore presumptively regular and valid, defendant could not overcome the presumption of regularity by showing that the trial court sentenced him more harshly for exercising his right to a jury trial or that it improperly based the sentence on uncharged criminal conduct. Although the court stated that it would give defendant the same sentence he received in his prior trial (for the same charge) if he wanted to "accept responsibility," the court also said that its job was not to punish defendant for rejecting a plea offer but to be fair and impartial. Additionally, defendant did not assert his Fifth Amendment privilege, object, or ask to speak with his attorney when the court questioned him about his prior illegal drug use. **State v. Guerrero, 236.**

N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

BRADFORD v. BRADFORD

[279 N.C. App. 109, 2021-NCCOA-447, -448]

CODY LYNN BRADFORD, PLAINTIFF
v.
JENNIFER BRADFORD, DEFENDANT

No. COA20-358, 20-377

Filed 7 September 2021

1. Divorce—equitable distribution—voluntary dismissal without prejudice—action terminated

On consolidated appeal from an order dismissing a wife's motions in the cause for equitable distribution in two separate cases, the appellate court held that the trial court properly dismissed the wife's equitable distribution claim in the first case (initiated by a custody complaint filed by the husband, to which the wife filed counterclaims, including for equitable distribution) because after all of the claims except for the wife's equitable distribution claim had been fully resolved or dismissed by the parties, the wife's voluntary dismissal without prejudice of the equitable distribution claim had the effect of terminating the action. Therefore, her equitable distribution claim could be reasserted only by timely commencing a new civil action or by asserting the claim in the other Chapter 50 action (for absolute divorce) pending between the parties.

2. Divorce—equitable distribution—motion in the cause—before entry of absolute divorce judgment

On consolidated appeal from an order dismissing a wife's motions in the cause for equitable distribution in two separate cases, the appellate court held that the trial court erred by dismissing the wife's equitable distribution claim in the second case (initiated by an absolute divorce complaint filed by the husband) where the wife asserted her equitable distribution claim via a motion in the cause before entry of the absolute divorce judgment.

Appeals by defendant from order entered 24 February 2020 by Judge Hal Harrison in District Court, Yancey County. Heard in the Court of Appeals 26 January 2021.

Law Offices of Jamie A. Stokes, PLLC, by Jamie A. Stokes, for plaintiff-appellee.

Donald H. Barton, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Jennifer Bradford ("Wife") appeals from an order dismissing her two separate motions in the cause for equitable distribution in two separate cases. Wife appealed the dismissal of each equitable distribution claim asserted in the two cases separately. The trial court entered one order addressing both motions to dismiss in the two separate actions, and we have consolidated these appeals pursuant to North Carolina Appellate Rule 40. *See* N.C. R. App. P. 40.

¶ 2 In File No. 18 CVD 201, we hold the trial court properly dismissed Wife's equitable distribution claim because when Wife filed the motion in the cause, all pending claims had been fully resolved or dismissed by the parties and the effect of her prior voluntary dismissal of her equitable distribution claim without prejudice under Rule 41(a)(1) was "to terminate the action." In File No. 19 CVD 224, we hold the trial court erred in dismissing Wife's equitable distribution claim because Wife asserted her equitable distribution claim by a motion in the cause filed *before* entry of the absolute divorce judgment. As a result, we affirm in part and reverse and remand in part the trial court's order.

I. Background

¶ 3 Husband and Wife married 1 April 2011, had one child in 2015, and separated 26 September 2018. On 27 September 2018, Husband filed a complaint in File No. 18 CVD 201 for *ex parte* temporary and permanent custody, and the trial court awarded him immediate sole legal and physical custody of the child. On 22 October 2018, Wife filed an answer and counterclaims for divorce from bed and board, child custody, child support, equitable distribution, post separation support, alimony, and attorney's fees. Subsequently, Husband and Wife each filed equitable distribution inventory affidavits. On 25 April 2019, the trial court entered a permanent child custody order.

¶ 4 A hearing on Wife's equitable distribution counterclaim was calendared for 17 December 2019. Wife took a voluntary dismissal with prejudice of all of her counterclaims — except her claim for equitable distribution — on 1 October 2019.

¶ 5 On 11 October 2019, Husband filed a complaint for absolute divorce in File No. 19 CVD 224. In the complaint, Husband asked "that the equitable distribution claim in Yancey County File No. 18CVD201 be severed and preserved." A hearing on the absolute divorce claim in File No. 19 CVD 224 was calendared for 27 January 2020.

¶ 6 The trial court entered a final pre-trial order on equitable distribution in File No. 18 CVD 201 on 18 November 2019. On 17 December 2019, after mediation reached an impasse, Wife took a voluntary dismissal without prejudice of her counterclaim for equitable distribution in File No. 18 CVD 201. On 27 January 2020, Wife filed motions in the cause asserting claims for equitable distribution in both File Nos. 18 CVD 201 and 19 CVD 224; both motions were filed at 8:21 A.M. Later the same day, after a testimonial hearing upon the absolute divorce claim, the trial court entered an absolute divorce judgment in File No. 19 CVD 224. The signed divorce judgment was filed at 10:07 A.M.

¶ 7 On 5 February 2020, Husband filed motions to dismiss Wife's motions in the cause in File Nos. 18 CVD 201 and 19 CVD 224. Husband's motions to dismiss were based upon North Carolina General Statute § 50-20 and North Carolina General Statute § 1A-1, Rule 12(b)(1), raising the issue of subject matter jurisdiction. In his motion to dismiss Wife's motion in the cause in File No. 18 CVD 201, Husband argued that File No. 18 CVD 201 was closed when Wife dismissed her equitable distribution counterclaim without prejudice and, accordingly, there were no pending causes of action as of 27 January 2020 in that case. In his motion to dismiss Wife's motion in the cause in File No. 19 CVD 224, Husband alleged that Wife did not file an answer or request an extension of time after being served with the complaint for absolute divorce; Wife did not seek leave of court to answer the complaint for absolute divorce; and Wife did not bring an independent equitable distribution cause of action after voluntarily dismissing her counterclaim for equitable distribution in File No. 18 CVD 201.

¶ 8 Husband's motions to dismiss came on for hearing on 14 February 2020 in Yancey County District Court. Neither Wife nor her attorney was present at the hearing.[1] In an order entered 24 February 2020, the trial court granted Husband's motions to dismiss Wife's motions in the cause in File Nos. 18 CVD 201 and 19 CVD 224. Wife timely appeals.

II. Standard of Review

¶ 9 The order on appeal ruled on Husband's motion to dismiss based upon subject matter jurisdiction.

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1. On appeal, Wife has also challenged the trial court's denial of her motion to continue the hearing on the motions to dismiss based upon her attorney's conflict due to a previously scheduled contempt hearing in Henderson County. She also raised an issue on appeal regarding the lack of at least ten days prior notice of the hearing on the motions to dismiss. Because of our disposition, we will not address the other issues regarding timing of the notice of hearing and denial of the motion to continue.

> Rule 12(b)(1) permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy. We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings. Pursuant to the *de novo* standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trivette v. Yount, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011) (citations, quotation marks, and brackets omitted). Husband also presents an argument regarding the proper method for asserting an equitable distribution claim based upon an interpretation of North Carolina General Statute § 50-11 and thus raises an issue of statutory construction. Statutory construction is an issue of law which we review *de novo* on appeal. *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016).

III. Analysis

¶ 10 The trial court's order addressing the motions to dismiss in both actions includes several findings of fact, but most of the findings address the procedural history of the two cases and some findings address the issues regarding the motion to continue and timeliness of service of the notice of hearing.

¶ 11 The finding of fact relevant to the issues on appeal are as follows:

> 7. That as of January 27, 2020 there were no causes of action before the court in Yancey County file No. 18 CVD 201.
>
> 8. That on or about December 17, 2019 [Wife] took a voluntary dismissal without prejudice of her counterclaim for Equitable Distribution resolving all causes of action in Yancey County file No. 18 CVD 201.
>
> 9. That Yancey County File No. 19 CVD 224 is a complaint for Absolute Divorce filed by [Husband] on or about October 11, 2019.
>
> 10. That [Wife] was properly served with the divorce complaint in Yancey County File No. 19 CVD 224.
>
> 11. That [Wife] has not answered or sought leave of the court to answer or counterclaim in Yancey County File No. 19 CVD 224.

> 12. That a divorce judgment was entered in Yancey County File No. 19 CVD 224 on January 27, 2020.

The relevant conclusions of law are as follows:

> 1. That above "Findings of Fact" are herein incorporated by reference and made a part hereof.
>
> 2. The parties are properly before the court, and the Court has jurisdiction over the parties hereto and the subject matter herein.[2]

The trial court concluded it had subject matter jurisdiction but also granted Husband's motions to dismiss Wife's equitable distribution claims, apparently based upon its determinations that in File No. 19 CVD 224, Wife "has not answered or sought leave of court to answer or counterclaim" and in File No. 18 CVD 201, "as of January 27, 2020 there were no causes of action before the court in Yancey County file No. 18 CVD 201."

¶ 12 In North Carolina, "[u]pon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a) (2019). "An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 *unless the right is asserted prior to judgment of absolute divorce*[.]" N.C. Gen. Stat. § 50-11(e) (2019) (emphasis added).

¶ 13 Wife argues "the trial court committed reversible error in dismissing [Wife's] Motion for Equitable Distribution when [Wife] had properly filed her claim for equitable distribution in both 18-CVD-201 and 19-CVD-224." (Original in all caps.) Wife contends her claims for equitable distribution

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2. Husband's brief notes that "the trial court concluded as a matter of law in the dismissal Order that the court had subject matter jurisdiction" but contends "that conclusion only applies to the trial court's jurisdiction to enter the Order dismissing the action, not to whether its jurisdiction had been invoked as to the issue of equitable distribution." Since Husband's motions to dismiss were based upon his contention of a lack of subject matter jurisdiction, while the trial court concluded it had subject matter jurisdiction but also dismissed Wife's claims, the actual meaning of the conclusion is not clear. But we need not address Husband's contention regarding the interpretation of the order, as subject matter jurisdiction can be raised at any time, even for the first time on appeal, and we conduct *de novo* review of subject matter jurisdiction and issues of statutory interpretation as presented in this appeal. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986); *see also Hayes*, 248 N.C. App. at 415, 788 S.E.2d at 652.

in File Nos. 18 CVD 201 and 19 CVD 224 were preserved because they were filed before the trial court entered an absolute divorce judgment. In both File Nos. 18 CVD 201 and 19 CVD 224, Husband argues the equitable distribution claim cannot be "asserted" by a motion in the cause but that it must be brought by an independent complaint or a counterclaim. In File No. 18 CVD 201, Husband argues Wife's motion in the cause was untimely because she filed it over 30 days after she was served with the absolute divorce complaint. In File No. 19 CVD 224, Husband argues that "a new complaint is clearly required in order to commence a new civil action following a Rule 41 dismissal, and a motion in the cause in the dismissed action in insufficient." We address each action in turn.

A. File No. 18 CVD 201- Motion in the Cause Filed After Dismissal of Prior Claim

¶ 14 **[1]** First, we address the trial court's dismissal of Wife's motion in the cause for equitable distribution in File No. 18 CVD 201, after her voluntary dismissal of her equitable distribution claim in this action. Husband contends that a new complaint was necessary to commence a new civil action for equitable distribution after Wife took a Rule 41 dismissal of her counterclaims. Specifically, Husband argues that "no statutory authority exists that authorizes the re-initiation of a previously dismissed civil action by motion in the cause[.]" At least to the extent that Wife sought to re-commence the equitable distribution claim by a motion in the previously dismissed civil action, we agree.

¶ 15 As a general rule, the effect of a voluntary dismissal without prejudice under Rule 41(a)(1) is "to terminate the action, and no suit is pending thereafter on which the court can enter a valid order." *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E.2d 282, 286 (1973). But like most rules, this one has exceptions, and those exceptions depend upon the type of claim or action involved. A Rule 41 dismissal may apply to "an action or any claim therein." N.C. Gen. Stat. § 1A-1, Rule 41 (2019). Here, Wife had previously dismissed other claims within the same action, and then she dismissed her last remaining claim of equitable distribution. In domestic cases, one action may include several types of claims, and claims within the action may be treated differently. "An 'action' is defined as 'a formal complaint within the jurisdiction of a court of law.' A 'claim' is a 'demand for money or property' or a 'cause of action.' " *Massey v. Massey*, 121 N.C. App. 263, 267, 465 S.E.2d 313, 315 (1996) (quoting Black's Law Dictionary 28 (6th ed. 1990)).

¶ 16 In *Jackson v. Jackson*, 68 N.C. App. 499, 315 S.E.2d 90 (1984), this Court discussed one of the exceptions to the general rule that a Rule

41(a)(1) dismissal ends the trial court's jurisdiction to rule on a later motion. There, the plaintiff wife filed an action with claims for "child custody and support, alimony, sequestration of the marital home for the use and benefit of the children, and legal fees." *Id.* at 500, 315 S.E.2d at 90. The defendant husband filed an answer and counterclaims for child custody and support, divorce from bed and board, possession and use of the marital home, alimony, and legal fees. *Id.* After a hearing, in January 1982 the trial court entered an order dismissing the wife's claims with prejudice under Rule 41(b) and dismissing the husband's claims without prejudice due to a defect in notice to the wife. *Id.* In March 1982, the husband filed a motion in the cause for child custody and support and possession of the marital home. *Id.* at 501, 315 S.E.2d at 91. The trial court then entered an order ruling on husband's motion and granting the husband child custody and support. *Id.* The wife filed a motion pursuant to Rule 60(b)(4) to set aside the court's order for lack of jurisdiction; the trial court denied her motion and wife appealed. *Id.* On appeal, the wife argued "the District Court was without jurisdiction to entertain a motion in the cause since no cause existed after the entry of the order of dismissal." *Id.*

¶ 17 This Court noted that under Rule 41(b), "[t]he court's dismissal of plaintiff's claim for alimony operated as a final adjudication on the merits" but held the trial court still retained jurisdiction over the matters of child custody and support based upon husband's motion in the cause filed after the dismissals of both wife's and husband's claims and counterclaims. *Id.* As to jurisdiction, this Court held:

> The court's ruling on plaintiff's claims for custody and support cannot be said to be a final adjudication[,] however, since the issue of custody and support remains *in fieri* until the children have become emancipated. Where custody and support are brought to issue by the pleadings, the court retains continuing jurisdiction over these matters even when the issues are not determined by the judgment. Here, where the issues of custody and support were raised in plaintiff's complaint and ruled on by the trial judge, we think it clear that the court retained jurisdiction to entertain and rule on defendant's motion in the cause.

Id. at 501–02, 315 S.E.2d at 91 (citations and quotation marks omitted).

¶ 18 In the context of child custody and support, even where a party has dismissed a claim, the trial court may retain jurisdiction to enter further

orders. "Indeed, this Court has consistently upheld the continuing jurisdiction of the trial court over child custody and support actions and has often reiterated that the 'jurisdiction of the court to protect infants is broad, comprehensive and plenary.' " *Massey v. Massey*, 121 N.C. App. 263, 268–69, 465 S.E.2d 313, 316 (1996) (quoting *Latham v. Latham*, 74 N.C. App. 722, 724, 329 S.E.2d 721, 722 (1985)). But equitable distribution claims are not subject to the same rules of continuing jurisdiction as child support and custody claims, nor does the trial court have the same interest in protecting the best interests of the children in this type of claim. For an equitable distribution claim, the general rule controls: Wife's voluntary dismissal of her equitable distribution claim without prejudice under Rule 41(a)(1) terminated the action.

¶ 19 As of 1 October 2019, all the "claims" in the "civil action" in File No. 18 CVD 201 had been dismissed or fully resolved, with the exception of Wife's counterclaim for equitable distribution. When Wife filed the notice of voluntary dismissal of this remaining "claim" in the "civil action," that civil action was closed. Wife took the voluntary dismissal without prejudice, so she still retained the right to assert a "claim" for equitable distribution until entry of an absolute divorce judgment. N.C. Gen. Stat. § 1A-1, Rule 41. But after she dismissed her equitable distribution counterclaim, her claim for equitable distribution could be re-asserted only by timely "commencing" a new "civil action" by filing a summons and complaint or by asserting the claim by a pleading or motion in the other Chapter 50 action pending between the parties, specifically the absolute divorce action in File No. 19 CVD 224. See id. Because Wife's prior dismissal of her equitable distribution claim terminated the action, after the dismissal there was "no suit . . . pending thereafter on which the court [could] enter a valid order[,]" *Collins*, 18 N.C. App. at 50, 196 S.E.2d at 286, and the trial court did not err in allowing Husband's motion to dismiss Wife's motion in the cause in File No. 18 CVD 201.

B. File No. 19 CVD 224- Motion in the Cause Prior to Entry of Absolute Divorce Judgment

1. Timing of Claim

¶ 20 **[2]** We will first address Husband's argument that Wife was barred from filing an answer or counterclaim, or a motion in the cause including a claim for equitable distribution, because her motion was filed over 30 days after service of the summons and complaint. Husband has cited no cases in support of this argument that Wife's time to file an answer or counterclaim had "expired" but cites only North Carolina General Statute § 1A-1, Rule 12(a)(1).

¶ 21 Here, there was no entry of default or other order limiting Wife's ability to file an answer, counterclaim, or motions in the pending absolute divorce action against her. *See* N.C. Gen. Stat. § 1A-1, Rule 55(a) (2019) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute . . . the clerk shall enter his default."). And in a claim for absolute divorce, the procedure of obtaining a judgment by default after entry of default is not available to bar a defendant from answering the divorce complaint even after the expiration of 30 days after service of the summons and complaint because the allegations of the complaint are "deemed to be denied" even if no answer has been filed. N.C. Gen. Stat. § 50-10(a) (2019) ("[T]he material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, *and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury*." (emphasis added)).

¶ 22 Wife filed her motion before entry of the absolute divorce judgment. Even though she had not filed an answer, the allegations of the absolute divorce complaint were "deemed to be denied" under North Carolina General Statute § 50-10 and Wife's right to file an answer, counterclaim, or motion prior to entry of the absolute divorce had not "expired."

¶ 23 The trial court's order also found Wife had not sought "leave of court" to file an answer or counterclaim. Husband has not identified any statutory requirement for Wife to seek "leave of court" to file an answer or motion in this situation. The reference to "leave of court" appears to be based upon North Carolina General Statute § 1A-1, Rule 15(a), which allows a party to

> amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only *by leave of court* or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2019) (emphasis added). Wife had not filed any answer or pleading in this action before filing her motion in the cause, so there was no prior pleading for her to seek "leave of court" to amend. Wife still had the right to file an answer, counterclaim, or motion in the divorce action. The time for Wife to "assert" her equitable distribution claim in this situation expired only upon entry of the divorce judgment, and she filed her motion before entry of the judgment.

¶ 24 The only statutory limitation on the time for bringing an equitable distribution claim pertinent to this case is found in North Carolina General Statute § 50-11, requiring only that the equitable distribution claim be "asserted" before the entry of the absolute divorce judgment. N.C. Gen. Stat. § 50-11(e). The absolute divorce judgment here was entered on 27 January 2020 at 10:21 A.M., when it was written, signed, and filed. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2019) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5.").

¶ 25 In *Santana v. Santana*, 171 N.C. App. 432, 614 S.E.2d 438 (2005), the wife filed a complaint for absolute divorce. *Id.* at 433, 614 S.E.2d at 439. Her complaint alleged that the issues of child support, alimony, and equitable distribution " 'are to be reserved.' " *Id.* The husband filed an answer joining in the request for absolute divorce. *Id.* The wife then filed a motion for summary judgment on the request for absolute divorce. *Id.* The trial court held the divorce hearing on 11 August 2003 and "orally pronounced and rendered an absolute divorce in open court," but did not sign and file the divorce judgment until 19 August 2003. *Id.* at 435, 614 S.E.2d at 440. On 18 August 2003, after the hearing and rendition of the ruling but before entry of the divorce judgment, the wife filed a motion alleging, "the parties own marital property located in Mexico, specifically but not limited to a house owned by the [wife] solely and retirement funds in the [husband's] name [wife] has a marital interest in said property." *Id.* at 433, 614 S.E.2d at 439 (quotation marks omitted). The wife requested the court "reserve [her] rights to equitable distribution of marital property and debts." *Id.* The husband filed a motion to dismiss the wife's claim for equitable distribution. *Id.*

¶ 26 The trial court granted the motion to dismiss because the motion raising the equitable distribution claim was "not timely filed, and [is] therefore barred as a matter of law." *Id.* at 434, 614 S.E.2d at 439. This Court reversed the trial court's order, holding that "[s]ince [the wife] asserted her right to equitable distribution prior to the divorce judgment, her claim for equitable distribution was not barred as a matter of law, and the trial court erred in granting [the d]efendant's motion to

dismiss. N.C. Gen. Stat. § 50–11(e)." *Id.* at 435, 614 S.E.2d at 440. Just as in *Santana*, here Wife "asserted her right to equitable distribution prior to the divorce judgment [so] her claim for equitable distribution was not barred as a matter of law" based upon the time she filed her motion. *Id.* Moreover, as discussed below, although the *Santana* Court did not specifically address the propriety of bringing the equitable distribution claim in a motion instead of a complaint or counterclaim, *Santana* supports our conclusion that an equitable distribution claim can be "asserted" by a motion in the cause. *See id.*

2. Propriety of Bringing Equitable Distribution Claim as Motion in the Cause

¶ 27 Husband argues the equitable distribution claim must be brought by a complaint or an answer and counterclaim, not a motion in the cause. Husband interprets the language of North Carolina General Statute § 50-21(a) as limiting the scenarios when an equitable distribution action may be brought in a motion in the cause to the "two very limited and specific circumstances" enumerated in subsections (e) and (f) of North Carolina General Statute § 50-11. Thus, Husband argues that since the circumstances addressed by subsections (e) and (f) are not present in this case, Wife's motions in the cause did not invoke the trial court's subject matter jurisdiction over the equitable distribution claim. We must consider whether North Carolina General Statutes §§ 50-20 and 50-21 limit the mechanism for "asserting" an equitable distribution claim to a particular form of pleading – a complaint or counterclaim – but not a motion in the cause.

¶ 28 North Carolina General Statute § 50-21 sets the beginning of the time for asserting an equitable distribution claim – the date of separation – and provides how the claim may be brought as an individual claim or may be joined with other claims:

> (a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, *or together with any other action brought pursuant to Chapter 50 of the General Statutes*, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (emphasis added). Subsections (e) and (f) of North Carolina General Statute § 50-11 provide for two limited exceptions when the equitable distribution claim may be asserted *after* entry of the absolute divorce judgment:

> (e) An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.
>
> (f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to equitable distribution under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered. The validity of such divorce may be attacked in the action for equitable distribution.

N.C. Gen. Stat. § 50-11(e), (f).

¶ 29 Husband's interpretation of North Carolina General Statute § 50-11 focuses on the second phrase of subsection (e), but the second phrase simply does not apply to this case, and the use of the words "motion in the cause" in that subsection implies no limitation on how the equitable distribution claim may be brought in other circumstances. Subsections (e) and (f) both address situations where the divorce judgment has already been entered so there may be no pending claims left in the absolute divorce action, but the spouse who wants to assert an equitable distribution claim in the circumstances described in subsections (e) and (f) still has the option of filing either a new action or a motion in the cause. *See* N.C. Gen. Stat. § 50-11(e), (f). These subsections address only the timing of the equitable distribution claim – allowing it to be asserted after the entry of the absolute divorce – not the type of pleading in which the claim may be asserted.

¶ 30 The statutory language is clear. *See Correll v. Division of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) ("The legislative purpose of a statute is first ascertained by examining the statute's plain language."). The first phrase of subsection (e) addresses the timing for the assertion of an equitable distribution claim in general: "An absolute divorce obtained within this State shall destroy the right of a spouse

to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce[.]" N.C. Gen. Stat. § 50-11(e). This phrase is followed by a semicolon and the word "*except*." *Id.* (emphasis added). The second phrase, by its express terms, notes an *exception* to the general rule stated in the first phrase that an equitable distribution claim must be "asserted" *before* the absolute divorce judgment. *Id.* That exception applies only to a defendant-spouse served by publication who failed to appear in the absolute divorce action. *Id.* Subsection (f) also notes an exception to the rule stated in the first phrase of subsection (e) that the equitable distribution claim must be asserted before the absolute divorce judgment, applicable where the trial court lacked personal jurisdiction over the "absent spouse" or jurisdiction to dispose of the property. N.C. Gen. Stat. § 50-11(f). Neither of these exceptional circumstances applies here, as Wife was personally served with the summons and complaint.

¶ 31 None of the statutes addressing equitable distribution limit the particular type of pleading for "filing" (N.C. Gen. Stat. § 50-21) or "asserting" (N.C. Gen. Stat. § 50-11) an equitable distribution claim. The equitable distribution claim may be asserted in "a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f)." N.C. Gen. Stat. § 50-21(a). When Wife filed her motion in the cause, Husband's complaint for absolute divorce in File No. 19 CVD 224 – based on one year's separation as provided in North Carolina General Statute § 50-6 – was pending. The absolute divorce case is an "action brought pursuant to Chapter 50 of the General Statutes." *Id.* North Carolina General Statute § 50-21 does not limit a claim brought "together" with other Chapter 50 claims to a claim brought by a particular party. And in *Santana*, discussed above, the equitable distribution claim was asserted by a motion. *Santana*, 171 N.C. App. at 434, 614 S.E.2d at 439–40. In *Santana*, this Court noted the wife's motion was in accord with Rule 7: "N.C. Gen. Stat. § 1A–1, Rule 7(b) (2004) ('An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.)." *Id.* Wife's motion in the cause in File No. 19 CVD 224 complied with the requirements of Rule 7 and was statutorily authorized, as it was a claim filed "together with any other action brought pursuant to Chapter 50 of the General Statutes[.]" *See* N.C. Gen. Stat. § 50-21(a). And because it was filed before entry of the divorce judgment, Wife's motion preserved her equitable distribution claim.

3. Sufficiency of Pleading

¶ 32 Finally, this Court has noted that "a pleading requesting the court to enter an order distributing the parties' assets in an equitable manner is sufficient to state a claim for equitable distribution." *Coleman v. Coleman*, 182 N.C. App. 25, 28, 641 S.E.2d 332, 336 (2007) (citation omitted). We note this case does not present a question of the adequacy of the pleading of the equitable distribution claim. *Cf. id.* at 28, 641 S.E.2d at 335–36 ("Recognizing that '[t]here is nothing in the statute regarding the sufficiency of the pleadings to support a claim for equitable distribution[,]' our Supreme Court also acknowledged that 'equitable distribution is not automatic[,]' and that a party seeking such division of marital property 'must specifically apply for it.' " (citation omitted (alterations in original))). However, we note that Wife's motion in the cause in File No. 19 CVD 224 was specifically based upon North Carolina General Statute § 50-20 and included detailed allegations of an equitable distribution claim, including a claim for "a share greater than fifty percent of all Marital and Divisible Property" based upon the statutory factors in North Carolina General Statute § 50-20(c). Thus, Wife's motion in the cause in File No. 19 CVD 224 was sufficient to state a claim for equitable distribution.

IV. Conclusion

¶ 33 As to File No. 18 CVD 201, where Wife filed a motion in the cause after all claims had been fully resolved or dismissed by the parties, the effect of the voluntary dismissal without prejudice under Rule 41(a)(1) was "to terminate the action, and no suit is pending thereafter on which the court can enter a valid order." *Collins*, 18 N.C. App. at 50, 196 S.E.2d at 286. As a result, we affirm the portion of the trial court's order dismissing Wife's equitable distribution claim in File No. 18 CVD 201.

¶ 34 As to File No. 19 CVD 224, where Wife's motion in the cause asserted a claim for equitable distribution and was filed before entry of the divorce judgment, her equitable distribution claim was preserved. As a result, we reverse the portion of the trial court's order dismissing Wife's equitable distribution claim in File No. 19 CVD 224 and remand for further proceedings upon this claim.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ZACHARY and GORE concur.

COHEN v. CONT'L MOTORS, INC.

[279 N.C. App. 123, 2021-NCCOA-449]

FRED COHEN, Executor of the Estate of DENNIS ALAN O'NEAL, Deceased, and FRED COHEN, Executor of the Estate of DEBRA DEE O'NEAL, Deceased, Plaintiffs
v.
CONTINENTAL MOTORS, INC. (f/k/a TELEDYNE CONTINENTAL MOTORS, INC. and/or TELEDYNE CONTINENTAL MOTORS); and AIRCRAFT ACCESSORIES OF OKLAHOMA, INC., Defendants

No. COA20-418

Filed 7 September 2021

1. Appeal and Error—interlocutory appeal—granted motion to dismiss for lack of personal jurisdiction

In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, plaintiff's interlocutory appeal from an order granting defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction was immediately appealable under N.C.G.S. § 1-277(b) and because motions to dismiss for lack of personal jurisdiction affect a substantial right.

2. Jurisdiction—personal—lack of—defense raised in responsive pleading—no waiver

In an action brought against an aircraft components manufacturer (defendant) after a fatal plane crash, defendant did not waive its challenge to personal jurisdiction by allowing roughly three years to pass since plaintiff filed the complaint or by participating in limited discovery pertaining solely to the personal jurisdiction issue. Rather, defendant preserved its defense of lack of personal jurisdiction by raising it in its answer to plaintiff's complaint, pursuant to Civil Procedure Rule 12.

3. Jurisdiction—personal—specific—purposeful availment—foreign aircraft parts manufacturer—serving a North Carolina market

In an action brought against an out-of-state aircraft components manufacturer (defendant) after two North Carolina residents (decedents) died in a plane crash in North Carolina, the trial court erred in granting defendant's motion to dismiss for lack of personal jurisdiction. Defendant directly sold aircraft parts to a North Carolina-based maintenance servicer through an independent distributor in North Carolina, including the engine starter adapter that allegedly caused the crash and that another out-of-state company overhauled and sent back to the maintenance servicer, which then installed the adapter into decedents' private plane based on

instructions that defendant directly provided in exchange for a subscription fee. Taken together, the facts indicated that defendant was actively serving a North Carolina market (albeit indirectly) for its products and, therefore, purposefully availed itself of the privileges of conducting activities in North Carolina.

Judge TYSON concurring in part and concurring in the result in part by separate opinion.

Appeal by Plaintiffs from Order entered 12 March 2020 by Judge James L. Gale in Nash County Superior Court. Heard in the Court of Appeals 12 May 2021.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Miller, III; and The Wolk Law Firm, by Michael S. Miska, pro hac vice, for plaintiff-appellant.

Armbrecht Jackson LLP, by Lacey D. Smith, Sherri R. Ginger, and Timothy A. Heisterhagen; and Williams Mullen, by Elizabeth D. Scott, for defendant-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, Christopher R. Kiger, and Amelia L. Serrat, for amicus curiae North Carolina Association of Defense Attorneys.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Fred Cohen (Plaintiff), Executor of the Estates of Debra Dee O'Neal and Dennis Alan O'Neal (the O'Neals), appeals from an Order granting a Motion to Dismiss for Lack of Personal Jurisdiction entered in favor of Continental Motors, Inc. (CMI). The Record before us tends to reflect the following:

The Accident

¶ 2 At approximately 12:30 p.m. on 31 March 2013, the O'Neals, residents of Blounts Creek, North Carolina, took off from Wilkes County Airport in North Wilkesboro, North Carolina, flying a Lancair LC42-550FG (the Aircraft) destined for Warren Field Airport in Washington, North Carolina. The O'Neals were licensed and experienced aircraft pilots;

Debra O'Neal piloted the Aircraft. After the Aircraft climbed to 5,000 feet, at 12:46 p.m. "the pilot declared an emergency and reported[:] . . . 'low fuel pressure -- engine's quitting.' " "[An] air traffic controller vectored the airplane toward" Smith Reynolds Airport in Winston-Salem. "[D]uring the descent[,] the pilot reported smoke in the cockpit and subsequently reported that the engine was 'barely' producing power." Data from the accident would later reveal the engine had lost power after losing oil pressure. At 12:50 p.m., approximately three miles west of Smith Reynolds Airport, the Aircraft made a forced landing, collided with trees and terrain, and burst into flames, killing both O'Neals. Plaintiff was appointed as the Executor of the O'Neals respective Estates.

Continental Motors, Inc.

¶ 3 CMI "is a Delaware corporation with a principal place of business in Mobile, Alabama." "CMI is engaged in the business of designing, manufacturing, and selling aircraft engines and component parts." According to its then-Director of Certification and Airworthiness, Michael E. Ward (Ward), during deposition, "C[MI] markets to the flying public at large . . . [and] ha[s] an international market." In fact, CMI claims, "[f]rom 2010 to 2013, [it] sold parts in all fifty United States[,]" including North Carolina, "as well as in other countries."

¶ 4 CMI's business model involves "sell[ing] through distribution, so [it] ha[s] distributors that purchase [CMI] parts and sell [them] into the aviation public." Thus, from 2010 to 2013, "distributors would order parts from C[MI], and the[] [parts] would be shipped either to the distributor or drop-shipped to the customer at the distributor's request." "Triad Aviation" (Triad), "located in Burlington, North Carolina . . . operated as a distributer for C[MI] parts from 2010 to 2013." More specifically, "[f]rom May 2010 to August 2013, C[MI] engaged in 2,948 sales of component parts with a total value of $3,933,480.65 through Triad . . . ." North Carolina "orders were taken from Triad . . . , and the parts were delivered either to Triad or drop shipped at [customers'] instructions."[1]

¶ 5 During the 2010-2013 period, Air Care Aviation Services (Air Care), "a maintenance and avionics provider" headquartered and with principal place of business in North Carolina, sold and serviced CMI components. CMI made "no direct sales to Air Care"; however, "Triad . . . purchased

1. As Timothy J. Padgett (Padgett), then-Director of Maintenance at Air Care Aviation Services, confirmed during his deposition, "if [someone] needed to get . . . a C[MI] part for [their] plane, [they]'d call up . . . Triad" or another distributor known as "Aviall . . . to get it[.]" However, "if [customers] need[ed] to troubleshoot a problem with a [CMI] component . . . [they]'d have to go to C[MI] for that."

approximately twelve (12) products from C[MI] that were drop-shipped to Air Care from approximately May 2010 to August 2013." Although it does not appear it was standard practice to do so at the time, "on occasion" Air Care would call CMI for support.

¶ 6 CMI "[wa]s the Type Certificate Holder for IO-550-N series engines such as the" engine inside the Aircraft, "and provide[d] continued airworthiness instructions for that engine series in compliance with Federal Aviation Administration . . . regulations[.]" During the 2010-2013 period, CMI's "in-house[,]" "online technical library and the service instructions it contained were available to service centers like Air Care through a subscription to C[MI]'s FBO[2] Services Link." "To subscribe to C[MI]'s FBO Service[s] Link, a subscriber would go to C[MI]'s website to create a profile and pay a subscription fee." "Once that fee was paid, the computer program would authorize the subscription, and [subscribers] would have access to the publications." CMI would then "post[] service updates to service bulletins in its online library and notif[y] subscribers of those updates through e-mail broadcasts." Through this technical library, "subscribers would have access to manuals, overhaul manuals, [and] maintenance manuals, [all] for [the] subscription fee." Additionally, "[w]hen an engine ships from C[MI], there is a log-book package that goes with the engine. And as part of that log-book package there is a compact disc that has the maintenance manuals for that engine as well as some other information."[3] In summary, during the 2010-2013 period, all this information was made available to subscribers directly from CMI. CMI "had fourteen North Carolina subscribers[,]" including Air Care.

The Aircraft

¶ 7 At the time of the crash, the Aircraft was privately owned by the O'Neals and registered in North Carolina. Prior to the O'Neals' purchase of the Aircraft in 2010, it had been owned by at least one other owner. The Aircraft, manufactured in 2003, "was equipped with a

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2. According to the FAA, FBO stands for "Fixed Base Operator." Federal Aviation Administration, *Airport Acronyms and Abbreviations* 43, https://www.faa.gov/airports/resources/acronyms/#f (last visited July 21, 2021). "A Fixed Base Operator engages in and furnishes a full range of aeronautical products, services and facilities to the public[.]" Duluth International Airport, *Rules and Standards*, (June 2014) https://www.lsc.edu/wp-content/uploads/DLH-Rules-and-Standards.pdf.

3. According to Ward, CMI also had, "from September 2013 to May of 2015 . . . one employee, a service representative, who was based out of North Carolina, although his duties were unrelated to this matter."

C[MI] IO-550N, 310-horsepower engine." "CMI designed and manufactured the IO-550-N2B engine . . . at its facility in Mobile, Alabama." "The [e]ngine was sold and shipped to The Lancair Company . . . in Bend, Oregon on or around March 31, 2002." "The [e]ngine was [then] installed in the . . . [A]ircraft[.]"

¶ 8 "The [e]ngine, as sold by CMI to Lancair, was assembled with a starter adapter[4] . . . in accordance with CMI's FAA-approved Type Design Data for the [e]ngine." "[T]h[is] original starter adapter . . . assembled to the [e]ngine by CMI was removed and replaced with a different model starter adapter . . . sometime while the Aircraft and [e]ngine were at Lancair's facility in Bend[.]"

¶ 9 The O'Neals were customers of Air Care, and Air Care provided service and maintenance for the Aircraft. As part of its servicing and maintenance of the Aircraft, "Air Care installed a third starter adapter" (the Starter Adapter), "which was on the [e]ngine at the time of the accident[.]" Air Care "purchased the Starter Adapter from [d]efendant Aircraft Accessories of Oklahoma, Inc." (Aircraft Accessories) "as an overhauled starter adapter unit on or around January 29, 2013." This overhauled replacement was made because the second starter adapter "was slipping."[5] The third and final Starter Adapter was a CMI component, overhauled by Aircraft Accessories.

¶ 10 Air Care mechanic Justin Pearson (Pearson) installed the Starter Adapter "on or around February 11, 2013." Pearson used CMI's "maintenance manual to reinstall the engine and the engine mounts," as well as to "reinstall[] [the] A/C mount bracket, A/C compressor, air oil separat[o]r and starter with new O-ring . . . ." In fact, Air Care's mechanics at large "were expected to" use CMI's online library through Air Care's subscription when Air Care inspectors determined it was necessary for the mechanics to do so. Furthermore, "[t]he service instructions pertaining to the installation of the . . . Starter Adapter were in C[MI]'s IO-550 Permold Series Engine Maintenance and Overhaul Manual . . . ." As to whether the Starter Adapter was installed pursuant to CMI's manual, Timothy J. Padgett (Padgett), Director of Maintenance at Air Care, testified the following in deposition:

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4. According to Padgett, a starter adapter is "a component that resides on the back of the engine which engages with the drive of the engine for the starter."

5. During his deposition, Padgett testified "slipping" "means that when your starter's engaged, that the adapter is not turning the engine over."

Q. . . . . Do you expect that Air Care and [] Pearson would have followed the maintenance instructions with respect to the installation of the [S]tarter [A]dapter that C[MI] provided?

A. Yes.

Q. Do you believe that you used anybody's installation instructions for that [S]tarter [A]dapter?

A. No.

Q. In fact, do you believe [Pearson] solely followed the maintenance and installation procedures set forth in the C[MI] manual?

A. Yes.

Q. Is it Air Care's practice to utilize this manual as far as what instructions it uses in performing maintenance?

A. Yes.

Q. Do you believe that [] Pearson would have inspected the [S]tarter [A]dapter that was received from Aircraft Accessories of Oklahoma in accordance with the procedures enumerated in Section 10 of the C[MI] manual?

A. I believe so.

Q. Do you believe [] Pearson inspected it to see if there was a plug installed that's been identified in the parts diagram as either number 54 or number 55?

A. I would believe so.

Q. And when you signed off on that logbook entry, did you believe that the installation had been done in accordance with the C[MI] instructions?

A. Yes.

Plaintiff's Suit

¶ 11 On 12 March 2015, Plaintiff filed the Complaint on behalf of the Estates against CMI and Air Care, among others.[6] Against CMI, Plaintiff alleged claims including: Strict Liability; Negligence; Breach of Express and Implied Warranties; Negligent Misrepresentation; Fraud; "Recklessness, Outrageousness, Willful and Wanton Conduct";

6. The Complaint was originally filed in Wilson County; venue was then changed to Nash County.

and a claim under N.C. Gen. Stat. Section 75-1.1. "[The] claims against C[MI] are predicated upon two theories of liability—that the . . . Starter Adapter was subject to a design defect, and that the Service Manual upon which Air Care allegedly relied when installing the . . . Starter Adapter was defective."

¶ 12 On 22 May 2015, CMI filed its Answer, which included as an affirmative defense: "[t]hese Defendants assert that this Court does not have personal jurisdiction over these Defendants." On 2 November 2018, after several years and a few exchanges of discovery, CMI filed a Motion to Dismiss the Complaint under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure for Lack of Personal Jurisdiction. In its Motion, CMI, in relevant part, argued the following:

> Neither the engine, nor the [S]tarter [A]dapter in question, was designed, manufactured, or sold by CMI in North Carolina. Instead, the engine and the [S]tarter [A]dapter were designed and manufactured in Alabama. The engine, with its original starter adapter, was then sold from CMI's factory in Mobile to Lancair in Bend, Oregon. The original starter adapter was then later removed by third parties and eventually replaced with an overhauled part provided by third parties. The engine and accident [S]tarter [A]dapter ended up in North Carolina not through CMI's actions, but rather through the unilateral actions of other parties.
>
> . . . .
>
> CMI is not currently registered or otherwise licensed to do business in North Carolina, although it was registered with the North Carolina Secretary of State . . . for a brief period from November 2013 to August 2015 . . . .
>
> In the last five years, CMI has not maintained offices, places of business, post office boxes, or telephone listings in North Carolina; has had no real estate, bank accounts, or other interests in property in North Carolina; did not incur any obligation to pay, and has not paid, income taxes in North Carolina; did not have any warehouses, repair stations, sales agents, dealers, or other sales representatives located in North Carolina on a permanent or regular basis; has

> not conducted any regular or ongoing advertising, solicitation, marketing, or other sales promotions directed toward residents of North Carolina; and has not contracted to do business with any resident of North Carolina for purposes of distributing, servicing or marketing goods . . . .

¶ 13 The trial court heard arguments on CMI's Motion on 10 September 2019, during which the parties submitted affidavits and depositions in support of their respective arguments. The trial court further permitted limited additional discovery to be conducted post-hearing on the issue of personal jurisdiction and invited the parties to submit supplemental briefing. "After supplemental materials and briefs were submitted, the [trial] [c]ourt heard further oral argument on February 6, 2020."

¶ 14 In an Order dated 12 March 2020, the trial court granted CMI's Motion to Dismiss for Lack of Personal Jurisdiction, concluding, in pertinent part: "C[MI] has not waived its defense to personal jurisdiction and is not estopped from asserting it;" and "Plaintiff has not demonstrated that the exercise of specific jurisdiction over C[MI] is appropriate by a preponderance of evidence . . . ." With respect to the issue of waiver, the trial court reasoned, "[a]cknowledging that North Carolina's appellate courts have not addressed at length the issue of post-objection waiver[,]" that "[i]n most federal cases, the courts have required more than the passage of time and participation in limited discovery to find waiver" and "[i]n circumstances where waiver is found, the defendant has usually fully participated in the merits of the litigation or sought affirmative relief from the court." Thus, the trial court concluded CMI, after raising the defense of lack of personal jurisdiction in its Answer, "ha[d] participated only in limited written discovery bearing on matters related to specific jurisdiction and ha[d] requested no affirmative relief from the [c]ourt[.]"

¶ 15 Next, on the merits of CMI's Motion to Dismiss for Lack of Personal Jurisdiction, the trial court supported its conclusion with the following reasoning:

> "To determine whether it may assert specific jurisdiction over a defendant, the court considers '(1) the extent to which the defendant "purposefully availed" itself of the privilege of conducting activities in the State; (2) whether the plaintiff['s] claims arise out of those activities directed at the State; and (3) whether

> the exercise of personal jurisdiction would be constitutionally "reasonable." ' "
>
> . . . .
>
> While C[MI]'s broader contacts with North Carolina may be pertinent to the final question of whether exercising personal jurisdiction would be reasonable, the [c]ourt concludes that C[MI]'s characterization of the purposeful availment inquiry is consistent with controlling case law . . . .
>
> "The United State[s] Supreme Court has emphasized that 'specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.' "
>
> . . . .
>
> First, even if the [c]ourt assumes without deciding that C[MI]'s distributor relationships and sales in North Carolina are purposeful contacts with the State adequate to satisfy specific jurisdiction over claims arising from those contacts, those are unrelated to Plaintiff's claims against C[MI] in this litigation.
>
> . . . .
>
> Second, the Court agrees with C[MI] that the specific acts connected to the accident upon which Plaintiff relies do not support a finding that C[MI] purposely availed itself of doing business in North Carolina regarding those acts. Specifically, Plaintiff relies on C[MI]'s Service Manual and the FBO Services Link through which the Service Manual was made available to Air Care.
>
> . . . .
>
> A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction.

The trial court then granted CMI's Motion. Plaintiff filed written Notice of Appeal on 9 April 2020.

Appellate Jurisdiction

¶ 16 **[1]** "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Here, the Order granting CMI's Motion to Dismiss for Lack of Personal Jurisdiction is interlocutory because it does not dispose of the case in that it leaves Plaintiff's claims against Aircraft Accessories still pending for resolution.[7] *See Peterson v. Dillman*, 245 N.C. App. 239, 242, 782 S.E.2d 362, 365 (2016) ("An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy." (citation omitted)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citations omitted). However, by statute, "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b) (2019); see also § 7A-27(b)(4) ("[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any . . . order or judgment of the superior court from which an appeal is authorized by statute.").

¶ 17 Furthermore, "immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' " *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (citations omitted); *see also* N.C. Gen. Stat. § 1-277(a) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding . . . ."); *see also* § 7A-27(b)(3)(a) ("[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom an interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right."). This Court has concluded "motions to

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7. In an earlier appeal in this case, this Court affirmed the trial court's denial of Aircraft Accessories' Motion to Dismiss for Lack of Personal Jurisdiction, holding "the trial court did not err by concluding that Aircraft Accessories had sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction over it without violating the due process clause." *Cohen v. Cont'l Motors, Inc.*, 253 N.C. App. 407, 799 S.E.2d 72 (2017) (unpublished) (slip op. at *11).

dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006). Accordingly, immediate appeal is appropriate in this case.

Issues

¶ 18 The relevant issues on appeal are whether the trial court erred by granting CMI's Motion to Dismiss for Lack of Personal Jurisdiction on the bases: (I) CMI had not waived its personal jurisdiction challenge; and (II) the trial court lacked personal jurisdiction over CMI.

Analysis

¶ 19 "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).

> Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

Id. In this case, the parties submitted dueling affidavits and other discovery materials in support of their respective jurisdictional arguments; therefore, this case falls into the third category. *See id.*

¶ 20 If the parties "submit dueling affidavits[,] . . . the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Id.* at 694, 611 S.E.2d at 183 (second and third alterations in original; citations and quotation marks omitted); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits." (citation omitted)). In addition, where "defendants submit some form of evidence to counter plaintiffs' allegations, those allegations can no longer be taken as true or controlling and plaintiffs cannot rest on the allegations of the complaint." *Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218 (citations omitted). Where the trial court elects to decide

the motion to dismiss on competing affidavits, "the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence." *Id.* at 615, 532 S.E.2d at 217 (citations omitted). "If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Secs. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (alterations, citation, and quotation marks omitted).

¶ 21 Thus, in this context, "[t]he standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (second alteration in original; quotation marks omitted) (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). "We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant." *Id.* (citation omitted).

I. Waiver

¶ 22 **[2]** Plaintiff argues the trial court erred in concluding CMI had not waived its defense of Lack of Personal Jurisdiction by way of its "long participation in litigation on the merits" and, thus, in allowing CMI to raise this challenge in its Motion to Dismiss for Lack of Personal Jurisdiction.

¶ 23 "Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, *except*[,]" among others, "[l]ack of jurisdiction over the person[,]" which "may at the option of the pleader be made by motion . . . ." N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (emphasis added). Rule 12(b) further provides:

> A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

§ 1A-1, 12(b). Then, per Rule 12(h),

> [a] defense of lack of jurisdiction over the person . . . is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

§ 1A-1, Rule 12(h)(1).

¶ 24 Here, CMI raised the defense of Lack of Personal Jurisdiction in its Answer to Plaintiff's Complaint. Thus, pursuant to Rule 12 of our statutory Rules of Civil Procedure, because CMI raised this defense in a responsive pleading, CMI's jurisdictional challenge was not waived. *See id.*; *see also Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604 (1996) ("A defendant . . . cannot submit himself to the jurisdiction of the court or waive the defense of lack of personal jurisdiction by filing an answer which contains the defense of lack of personal jurisdiction . . . and/or engaging in discovery[.]" (citations omitted)). Accordingly, CMI's Motion to Dismiss for Lack of Personal Jurisdiction was not improper, and the trial court did not err in concluding CMI had not waived its jurisdictional challenge.

II. Personal Jurisdiction

¶ 25 The North Carolina Supreme Court has held

> that a two-step analysis must be employed to determine whether a non-resident defendant is subject to the *in personam* jurisdiction of our courts. First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.

Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citations omitted). In this case, the parties appear to agree North Carolina's "long-arm" statute is applicable to this case. Rather, the parties focus on the question of whether the exercise of personal jurisdiction in this case is consistent with the Due Process Clause of the Fourteenth Amendment.

¶ 26 The Supreme Court of the United States recently addressed the issue of a state court's authority to assert personal jurisdiction over an out-of-state Defendant under the Fourteenth Amendment in *Ford Motor Co.*

v. Montana Eight Jud. Dist. Ct., ___ U.S. ___ (2021).[8] "The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Id.* at ___ (slip op. at *4). Our courts "recogniz[e] two kinds of personal jurisdiction: general . . . jurisdiction and specific . . . jurisdiction." *Id.* at ___ (slip op. at *5) (citing *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011)). Specific jurisdiction "covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name 'purposeful availment.' " *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). "The defendant . . . must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.' " *Id.* (bracket in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1985)). "The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.' " *Id.* at ___ (slip op. at *6) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). "The[se] [contacts] must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there.' " *Id.* (second bracket in original) (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). "Yet even then . . . the forum State may exercise jurisdiction in only certain cases. The plaintiff's claims . . . 'must arise out of or relate to the defendant's contacts' with the forum." *Id.* (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 582 U.S. ___, ___, 137 S.Ct. 1773, 1780 (2017)). "[P]ut just a bit differently, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (second bracket in original; quotation marks omitted) (quoting *Bristol-Myers*, 582 U.S. at ___, 137 S.Ct. at 1780).

¶ 27 In *Ford*, the action arose out of two distinct vehicle accidents, in Montana and Minnesota respectively, involving two Ford vehicles. *Id.* at ___ (slip op. at *2). Ford, the defendant, "a global auto company . . . incorporated in Delaware and headquartered in Michigan[,]" conceded "it does substantial business in Montana and Minnesota[,] that it actively seeks to serve the market for automobiles and related products in those [s]tates[,]" and that "it ha[d] purposefully avail[ed] itself of the privilege of conducting activities in both places." *Id.* at ___ (slip op. at *2, 7-8) (last bracket in original; quotation marks omitted). However,

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8. We acknowledge that the trial court did not have the benefit of this decision at the time it ruled on CMI's Motion.

Ford argued "those activities d[id] not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford's view, the needed link [had to] be causal in nature[,]" claiming "[j]urisdiction attaches only if the defendant's forum conduct *gave rise* to the plaintiff 's claims." *Id.* at ___ (slip op. at *8) (quotation marks omitted).

¶ 28 The Supreme Court disagreed:

> None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit "arise out of *or relate to* the defendant's contacts with the forum." The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, *we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct.*

Id. at ___ (slip op. at *8-9) (last emphasis added; citations omitted). The Supreme Court then drew the following example:

> [I]ndeed, this Court has stated that specific jurisdiction attaches in cases identical to the ones here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. But in so doing, we contrasted the dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction):
>
> "[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts

> of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."
>
> Or said another way, if Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), then Oklahoma's courts could hold the companies accountable for a car's catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus "purposefully avail[ing] itself" of the Oklahoma auto market "has clear notice" of its exposure in that State to suits arising from local accidents involving its cars. And the company could do something about that exposure: It could "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State."

Id. at ___ (slip op. at *9-10) (all but first alterations in original; citations omitted). Then, the Supreme Court reasoned:

> Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. That is why this Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an illustration—even a paradigm example—of how specific jurisdiction works.

Id. at ___ (slip op. at *12) (citations omitted).

¶ 29 The fact pattern before us in the instant case is analogous. Here, CMI, by its employee's own admission, "markets to the flying public at large . . . [and] ha[s] an international market." In fact, "[f]rom 2010 to 2013, C[MI] sold parts in all fifty United States as well as in other countries[,]" which included the forum state, North Carolina. Although CMI

did not sell components to individual aircraft owners themselves, it actively maintained a business model that operated through independent distributors—including Triad, based in North Carolina. This made it so that if aircraft owners in North Carolina needed to purchase CMI parts, they would do so through Triad. Furthermore, during the time frame of the accident, CMI made it so that individuals across its international market, including those in North Carolina, could access its online database for a fee, thus drawing a benefit to itself from the "privilege of conducting activities" with North Carolina subscribers. *See id.* at ___ (slip op. at *5). One such North Carolina subscriber, Air Care, was in fact "expected to" rely on the information CMI provided through its subscriptions to operate on any aircrafts bearing CMI parts. In fact, even presuming *arguendo* Pearson, the Air Care mechanic, did not rely on CMI instructions to install the Starter Adapter, the evidence clearly indicates Pearson did indeed rely on CMI literature to operate on other components inside the O'Neals' Aircraft. The facts, thus, paint a clear picture: at the time of the accident, CMI "serve[d] a market for a product in the forum [s]tate" of North Carolina. *See id.* at ___ (slip op. at *9).

¶ 30 Consistent with CMI's business model, CMI's Starter Adapter was overhauled by Aircraft Accessories, moved to Triad (in North Carolina), then to Air Care (in North Carolina), and was finally installed in the O'Neals' Aircraft (in North Carolina). Thereafter, CMI's product allegedly malfunctioned in North Carolina, causing the accident. Applying the reasoning of *Ford* to this case: "the sale of [CMI's] product . . . [wa]s not simply an isolated occurrence, but ar[o]se[] from the efforts of [CMI] to serve, *directly or indirectly*, the [North Carolina] market . . . ." *See id.* at ___ (slip op. at *10) (emphasis added). In fact, "[f]rom May 2010 to August 2013, C[MI] engaged in 2,948 sales of component parts with a total value of $3,933,480.65" in North Carolina, serving the North Carolina market indirectly by operating "through Triad . . . ." Thus, "it is not unreasonable to subject [CMI] to suit in [North Carolina]" since "its allegedly defective [Starter Adapter] has there been the source of injury to its owner[s][,]" the O'Neals. *See id.*

¶ 31 Indeed, "this exact fact pattern (a resident-plaintiff sues a global [aviation] company, extensively serving the state market . . . for an in-state accident)" also effectively functions "as an illustration—even a paradigm example—of how specific jurisdiction works." *See id.* at ___ (slip op. at *2). Therefore, applying *Ford* to the particular facts of this case, exercise of personal jurisdiction in North Carolina over CMI does not offend the Due Process Clause of the Fourteenth Amendment. Consequently, in light of the *Ford* opinion issued after the trial court's

Order in this case, we must conclude the trial court erred in granting CMI's Motion to Dismiss for Lack of Personal Jurisdiction on this basis.

Conclusion

¶ 32 Accordingly, for the foregoing reasons, we affirm in part and reverse in part the trial court's Order granting CMI's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction. We remand this matter to the trial court for purposes of permitting the parties to pursue further proceedings on the merits of this litigation.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge WOOD concurs.

Judge TYSON concurs in part and concurs in the result in part by separate opinion.

TYSON, Judge, concurring in part and concurring in the result in part.

¶ 33 I fully concur with the majority's analysis and conclusion that Continental Motors, Inc. ("CMI") properly raised the defense of lack of personal jurisdiction in its Answer to Plaintiff's Complaint. Because this defense was raised in its first responsive pleading, CMI's jurisdictional challenge was not waived. I also agree and concur with the conclusion this interlocutory appeal is properly before this Court.

¶ 34 I concur in the result with the majority's opinion holding CMI can be haled into North Carolina's courts consistent with the Due Process Clause of the Fourteenth Amendment and North Carolina's long-arm jurisdiction statute. I write separately to catalog and limit the analysis on specific personal jurisdiction to CMI's activities within North Carolina. The trial court's order granting CMI's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction, entered prior to the Supreme Court of the United States' decision in *Ford*, is properly affirmed in part, reversed in part, and remanded.

¶ 35 CMI's Motion to Dismiss the Complaint, under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure for Lack of Personal Jurisdiction, argued, in relevant part, the following:

> Neither the engine, nor the [S]tarter [A]dapter in question, was designed, manufactured, or sold by CMI in North Carolina. Instead, the engine and the

> [S]tarter [A]dapter were designed and manufactured in Alabama. The engine, with its original starter adapter, was then sold from CMI's factory in Mobile to Lancair in Bend, Oregon. The original starter adapter was then later removed by third parties and eventually replaced with an overhauled part provided by third parties. The engine and accident [S]tarter [A]dapter ended up in North Carolina not through CMI's actions, but rather through the unilateral actions of other parties.
>
> . . . .
>
> CMI is not currently registered or otherwise licensed to do business in North Carolina, although it was registered with the North Carolina Secretary of State . . . for a brief period from November 2013 to August 2015 . . . .
>
> In the last five years, CMI has not maintained offices, places of business, post office boxes, or telephone listings in North Carolina; has had no real estate, bank accounts, or other interests in property in North Carolina; did not incur any obligation to pay, and has not paid, income taxes in North Carolina; did not have any warehouses, repair stations, sales agents, dealers, or other sales representatives located in North Carolina on a permanent or regular basis; has not conducted any regular or ongoing advertising, solicitation, marketing, or other sales promotions directed toward residents of North Carolina; and has not contracted to do business with any resident of North Carolina for purposes of distributing, servicing or marketing goods . . . .

¶ 36 The trial court granted CMI's Motion to Dismiss for Lack of Personal Jurisdiction, and properly supported its conclusion with the following reasoning:

> To determine whether it may assert specific jurisdiction over a defendant, the court considers "(1) the extent to which the defendant 'purposefully availed' itself of the privilege of conducting activities in the State; (2) whether the plaintiff['s] claims arise out of those activities directed at the State; and (3) whether

the exercise of personal jurisdiction would be constitutionally 'reasonable.' "

. . . .

While C[MI]'s broader contacts with North Carolina may be pertinent to the final question of whether exercising personal jurisdiction would be reasonable, the [c]ourt concludes that C[MI]'s characterization of the purposeful availment inquiry is consistent with controlling case law . . . .

The United State[s] Supreme Court has emphasized that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."

. . . .

First, even if the [c]ourt assumes without deciding that C[MI]'s distributor relationships and sales in North Carolina are purposeful contacts with the State adequate to satisfy specific jurisdiction over claims arising from those contacts, those are unrelated to Plaintiff's claims against C[MI] in this litigation.

. . . .

Second, the [c]ourt agrees with C[MI] that the specific acts connected to the accident upon which Plaintiff relies do not support a finding that C[MI] purposely availed itself of doing business in North Carolina regarding those acts. Specifically, Plaintiff relies on C[MI]'s Service Manual and the FBO Services Link through which the Service Manual was made available to Air Care.

. . . .

A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction.

I. Personal Jurisdiction

¶ 37 **[3]** After the trial court's order was entered, the Supreme Court of the United States issued a relevant decision. In order for a forum to assert specific personal jurisdiction over a non-resident, "there must be an

affiliation between the forum and the underlying controversy, principally an activity or an occurrence that takes place in the forum state and is therefore subject to the State's regulation." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, __ U.S. __ (2021) (slip op. at *6) (citation omitted). The Supreme Court of the United States has also held the suit must "arise out of *or relate to* the defendant's contacts with the forum." *Bristol-Myers Squib Co. v. Superior Court of Cal.*, 582 U.S. __, __, 198 L. Ed. 2d. 395, 403 (2017) (emphasis supplied).

¶ 38 In *Ford*, the Supreme Court recently interpreted this quote to mean:

> The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. *That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum.* . . . , we have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff's claim came about because of the defendant's in-state conduct.

Ford Motor Co., __ U.S. at __ (slip op. at *8-9) (emphasis supplied).

¶ 39 In a footnote, the majority's opinion in *Ford* re-affirms a state court *does not* necessarily have jurisdiction over a nationwide corporation for any claim, no matter how unrelated the corporation's activities are to the forum state. *Id.* at __ (slip op. at *9, n.3). Without this distinction and objective delineations, limitations on specific personal jurisdiction for non-forum "nationwide companies" would be destroyed. Very few nationwide companies boast the size, scope, scale, pervasiveness, and ubiquitous presence across national and international markets Ford has achieved.

¶ 40 Here, CMI admits it "markets to the flying public at large" and has sold parts in all fifty states. CMI allegedly participated in 2,948 sales of parts transactions through independent distributors, which were eventually sold to North Carolina, and which totaled $3,933,480.65 in revenue in a three-year period preceding the accident, including sales of new models of the starter adapter at issue. The specific personal jurisdiction over non-forum defendant analysis partially "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co.*, __ U.S. at __, 198 L. Ed. 2d at 403.

¶ 41 This Court has upheld specific personal jurisdiction over a non-forum company, which availed itself of conducting business in North Carolina after a company mailed out 1,937 sales catalogs in North Carolina in a season, directly sold products to 239 North Carolina residents, and generated over $12,000 in sales. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114-15, 516 S.E.2d 647, 650-51 (1999).

¶ 42 In the complaint, Plaintiff alleged, "the defects in the aircraft engine existed at the time the engine and engine assemblies were built and sold, manufactured and designed." None of those actions occurred in North Carolina.

¶ 43 Plaintiff also alleges, and Defendant denies, the starter adapter was subject to a design defect, and the service manual available to Air Care was incorrect. None of those actions occurred in North Carolina.

¶ 44 The Lancair LC42-550FG aircraft over its life was equipped with at least three different starter adapters. The first starter adapter was replaced at the aircraft manufacturer's factory without explanation, prior to the original sale and delivery, and long before the O'Neals' subsequently acquiring the aircraft. None of those actions occurred in North Carolina.

¶ 45 The second starter adapter "was slipping," which necessitated the replacement. The third starter adapter was not sold by CMI. It was sold from and by Aircraft Accessories of Oklahoma, who sold the remanufactured and overhauled part to Air Care in North Carolina, who ultimately installed the part on the O'Neals' aircraft based in North Carolina.

¶ 46 The part CMI had originally manufactured was altered, overhauled, and remanufactured by others without any links to or oversight by CMI. This part was identified by investigators as a precipitating cause of the crash and would not have entered North Carolina to be installed on the plane, but for the Aircraft Accessories of Oklahoma company. The Supreme Court of the United States, in *Ford*, emphasizes "some relationships will support jurisdiction without a causal showing." *Id.* at __ (slip op. at *8). Neither of the two vehicles involved in the collisions in *Ford*, were originally sold through a Ford Motor Company dealer network in the forum jurisdictions. Subsequent purchasers brought the vehicles into the respective forum states. Ford Motor Company neither designed nor manufactured the vehicles in the forums.

¶ 47 It must be noted that the phrase "relate to," and its meaning from *Ford* "incorporates real limits." *Id.* at __ (Alito, J., concurring) (slip op. at *4). The majority's opinion in *Ford* also cautions that "does not mean

anything goes. In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Ford Motor Co.*, __ U.S. at __ (slip op. at *8-9).

¶ 48 The majority's opinion in *Ford* does not articulate any guardrails or outer limits for lower courts to follow when evaluating whether due process concerns prevent a court from establishing specific personal jurisdiction over a non-forum defendant. *See id.* at __ (Gorsuch, J., concurring) (slip op. at *3).

> Where this leaves us is far from clear. For a case to "relate to" the defendant's forum contacts, the majority says, it is enough if an "affiliation" or "relationship" or "connection" exists between them. But what does this assortment of nouns *mean*? Loosed from any causation standard, we are left to guess. The majority promises that its new test "does not mean anything goes," but that hardly tells us what does. In some cases, the new test may prove more forgiving than the old causation rule. But it's hard not to wonder whether it may also sometimes turn out to be more demanding. Unclear too is whether, in some cases like that, the majority would treat causation and "affiliation" as alternative routes to specific jurisdiction or whether it would deny jurisdiction outright.

Id. (internal citations omitted).

¶ 49 Multiple cases remain undisturbed where the Supreme Court of the United States articulated and delineated significant due process protections from assertion of personal jurisdiction over a non-forum defendant: *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 921-929, 180 L. Ed. 2d 796, 804-809 (2011) (tire manufacturer who manufactured tires in Turkey, did not import the tire model into forum state, nor primarily distribute the tire model in the United States, could not be haled into forum for incident occurring in France despite parent company having large factory in forum); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298-299, 62 L. Ed. 2d 490, 502 (1980) ("mere unilateral activity" of plaintiffs to bring car into forum did not establish jurisdiction because defendants did not have minimum "contacts, ties or relations"); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416-19 80 L. Ed. 2d 404, 412-14 (1984) (forum did not acquire jurisdiction over Columbian corporation where that corporation contracted

in Peru to provide services, even though some goods were purchased in and some training occurred in forum); *Daimler AG v. Bauman*, 571 U.S. 117, 139, 187 L. Ed. 2d 624, 641 (2014) (forum may acquire general personal jurisdiction when a defendant conducts an overwhelming amount of activity within the forum); and, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487, 85 L. Ed. 2d 528, 550 (1985) (forum's exercise of jurisdiction not fundamentally unfair where corporation had substantial and continuing relationship with plaintiff-company's headquarters in the forum, contract documents provided notice and the course of dealing between the parties provided that corporation could be subject to suit in forum).

¶ 50 Here, while CMI does not approach the nationwide size, scope, and scale of Ford, its activities "related to" North Carolina more align with the facts in *Ford* than those of the decoy maker in Maine selling his hand-carved unique products online across state lines as memorialized in Justice Gorsuch's concurring opinion in *Ford*. *Id.* at __ (Gorsuch, J., concurring) (slip op., at 4).

II. Internet Based Service Manual

¶ 51 The trial court found CMI "has not conducted any regular or ongoing advertising, solicitation, marketing, or other sales promotions directed toward residents in North Carolina." In *Havey v. Valentine*, 172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647-48 (2005), our Court adopted the United States Court of Appeals for the Fourth Circuit rule for determining whether an internet website can become the basis for the exercise of personal jurisdiction in the forum in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002). *ALS Scan, Inc.* adopted the analysis from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997).

¶ 52 In *Havey*, this Court held:

> A State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include

> directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State. *When a website is neither merely passive nor highly interactive, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs.*

Havey, 172 N.C. App. at 816-17, 616 S.E.2d at 647-48 (emphasis supplied) (internal citations, quotation marks, and alterations omitted).

¶ 53 CMI's website is an interactive informational website. The website provides an "online technical library" where subscribers can "access instructions and manuals." Fixed-base operators and service centers, like Air Care could go to CMI's website and pay a subscription fee to access the "online technical library." CMI had 14 paid subscribers in North Carolina. CMI posted updates to this manual and notified its subscribers of the updates. While Air Care maintained a subscription to the manual, it is unknown whether their technicians accessed or referenced the manual while installing the remanufactured Starter Adapter on the O'Neals' aircraft.

¶ 54 "A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction." *ALS Scan, Inc.*, 293 F.3d at 714. CMI supports the "online technical library" with updates to notify its subscribers. The website contains a commercial nature due to its paid subscriptions. When considered with CMI's other contacts "related to" North Carolina and its "purposeful availment" of our forum, these contacts are sufficient to support our holding of specific personal jurisdiction. *Havey*, 172 N.C. App. at 815, 616 S.E.2d 646-47; N.C. Gen. § 1-75.4 (2019).

III. Conclusion

¶ 55 CMI properly raised the defense of lack of personal jurisdiction in its Answer to Plaintiff's Complaint. A North Carolina court exercising jurisdiction, pursuant to our long-arm statute, does not violate the Due Process Clause of the Fourteenth Amendment. This interlocutory appeal is properly before this Court.

¶ 56 Consistent with *Ford*, CMI is being haled into North Carolina's court, not for its nationwide contacts, nor fifty states' presence, nor merely placing an item into the stream of commerce, but for its specific contacts with North Carolina companies and consumers. I concur in part and concur in the result in part.

CRAIG v. NEAL

[279 N.C. App. 148, 2021-NCCOA-450]

ERIC E. CRAIG AND WIFE, GINA D. CRAIG, PLAINTIFFS
v.
BETTY BLAIR NEAL, DEFENDANT
AND
JACK HUDSON AND WIFE, GINNER HUDSON, AND JAMES F. SHUMAN, JR. AND WIFE, ANNE MARIE P. SHUMAN, NOMINAL DEFENDANTS

No. COA20-261

Filed 7 September 2021

Easements—appurtenant—right-of-way to road—fence dispute between neighbors

In a dispute that arose when plaintiffs built a fence that blocked defendant, their neighbor, from using a right-of-way that straddled their respective properties, the trial court erred by concluding that the right-of-way was a public right-of-way owned by the city, where the undisputed facts did not support such a conclusion. The previous owners of the large tract that was sold and divided into multiple lots (some of which were purchased by plaintiffs and defendant) created the right-of-way as a private appurtenant easement for the benefit of the owners of the adjacent land (benefiting plaintiffs and defendant here), as evidenced by a recorded 1952 plat (filed in anticipation of the large tract's sale and showing the new right-of-way) and other documents filed contemporaneously.

Appeal by Plaintiffs from order entered 28 October 2019 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2021.

Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies, for the Plaintiffs-Appellants.

Johnston, Allison & Hord, P.A., by Mary Fletcher Mullikin and Martin L. White, for the Defendant-Appellee

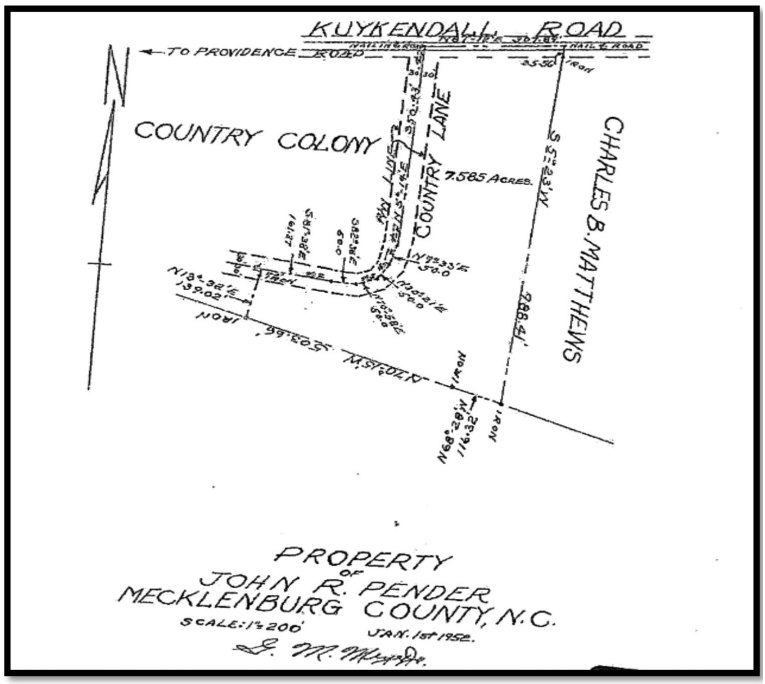
DILLON, Judge.

I. Background

¶ 1 Plaintiffs own a 2.57-acre lot located within Country Colony, a 17-lot residential subdivision in Charlotte. Defendant owns three residential lots adjacent to Plaintiffs' lot, but which lie *outside of* the Country

Colony subdivision. Their dispute concerns their respective rights, if any, to use a certain right-of-way depicted on a plat recorded in 1952 when Plaintiffs' lot and Defendant's three lots were part of a larger tract.

¶ 2 Prior to 1952, Plaintiffs' lot and Defendant's three lots were part of a larger 65-acre tract of land owned by the Newsons, a married couple. In 1952, a plat (the "1952 Plat") was recorded depicting a 7.585-acre tract carved out from the 65-acre tract. The 1952 Plat is reproduced below:



This 1952 Plat was filed in anticipation of the Newsons conveying part of their 65-acre tract – specifically this 7.585-acre tract – to another couple, the Penders, and retaining the remaining 57 acres for the development of Country Colony. The 1952 Plat depicts a new right-of-way, labeled as "Country Lane," straddling the boundary separating the 7.585-acre tract shares from the future Country Colony subdivision. Based upon the 1952 Plat, Country Lane is depicted as a right-of-way sixty (60) feet in width, with thirty (30) feet in width on either side of the boundary line.

¶ 3 Over the course of time, this 7.585-acre tract was subdivided into lots, with Defendant acquiring three of said lots. Country Colony was

developed into 17 lots, with Plaintiffs coming to own the lot adjacent to Defendant's property, along the bend of County Lane.

¶ 4 Also, at some point, two gravel roads were created within the Country Lane right-of-way. One of these roads provides Defendant access to her lots from Kuykendall Road. In 2018, Plaintiffs erected a fence on their lot that extended across the gravel road, depriving Defendant's ability to use the road to access Kuykendall Road from her lots. Plaintiffs' act led to the commencement of this action.

¶ 5 The matter was tried without a jury. Plaintiffs argued at trial, in part, that any right that Defendant might have had in Country Lane was extinguished by operation of the Marketable Title Act. The trial court, however, determined that Country Lane is, in fact, a public right-of-way, owned by the City of Charlotte. The trial court concluded the Marketable Title Act does not apply and ordered Plaintiffs to remove the fencing. Plaintiffs timely appealed.

II. Standard of Review

¶ 6 Since this matter was tried by the trial judge, and not by a jury, "the trial court is the fact finder; and on appeal, [we] are bound by the trial court's findings if competent evidence in the record supports those findings." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000). However, we review *de novo* the trial court's conclusions of law and whether those conclusions are supported by the findings of fact. *See Kirby Bldg. Sys., Inc. v. McNeil*, 327 N.C. 234, 241, 393 S.E.2d 827, 831 (1990).

III. Summary of Opinion

¶ 7 The parties dispute their respective rights to use the Country Lane right-of-way. Accordingly, "Country Lane," as used in this opinion, refers specifically to the 60-foot wide, right-of-way area *as depicted on the 1952 Plat*, and not to the gravel roads themselves or to any other area.[1]

¶ 8 The trial court determined that Country Lane is a public right-of-way, owned by the City of Charlotte, based on its finding that the Newsons dedicated Country Lane to the city when they recorded the 1952 Plat. Based on this determination, the trial court declared that all parties (and the public) have the right to use all of the Country Lane right-of-way.

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1. There was also evidence that a paved road extends along the southern border of the Country Colony subdivision *west of* Lot 10. This paved road was formally offered to and accepted by the City of Charlotte by the impacted lot owners. This paved road is also called Country Lane and does connect with the Country Lane right-of-way as depicted on

¶ 9 We conclude, however, that the trial court's findings and the undisputed facts do not support the trial court's finding that the Newsons intended to dedicate Country Lane to the City of Charlotte or any other governmental body back in 1952. Rather, we conclude the Newsons intended to create private easement rights for the benefit of the owners of the land adjacent to Country Lane as a matter of law. It may be that the City of Charlotte has come to own all or portions of Country Lane based on *some other legal theory*. However, no other theory has been argued in this appeal; the findings and the evidence in the record do not conclusively establish the City's ownership as a matter of law; and the City is not a party to this action.

¶ 10 Further, we conclude the parties have private appurtenant easement rights to portions of Country Lane not on their respective lot(s) for ingress and egress to the public roads.[2]

IV. Analysis

A. No Substantial Evidence That Country Lane Is a Public Right-Of-Way

¶ 11 The trial court found that the Newsons (who owned the original 65-acre tract) dedicated Country Lane as a *public road* in 1952. Specifically, the trial court found:

> The process followed by the developer of Country Colony [the Newsons] was typical for plats filed in the 1950s when rights of way were offered for *dedication* to the public. In the case, the recordation of the [1952 Plat] was an offer to dedicate Country Lane to the public.

(Emphasis added.) This theory of "dedication" formed the sole theory by which the trial court determined Country Lane to be a public road owned by the City of Charlotte.

¶ 12 The term "dedication" refers to the process by which an owner/developer of real estate offers, either formally or informally, some portion of his development *to the general public*, typically for a road, and said

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the 1952 Plat. However, this matter only concerns the non-paved portion of Country Lane, which is the right-of-way depicted in the 1952 Plat.

2. Nominal defendants (the Hudsons and the Shumans) own other lots that Country Lane crosses. The Hudsons own Lot 11 within Country Colony to the north of Plaintiffs' lot on the west side of Country Lane. The Shumans own a lot outside of Country Colony to the north of Defendant's lots on the east side of Country Lane.

offer is accepted by the governing authority. *See Spaugh v. Charlotte*, 239 N.C. 149, 159-60, 79 S.E.2d 748, 756 (1954).[3]

¶ 13 A dedication *offer* can be made either expressly or through implication. *Id.* at 159, 79 S.E.2d at 756 (stating that "[d]edication may be either in express terms or may be implied from conduct on the part of the owner"). But a dedication is only completed when the developer's offer is *accepted* by the responsible public authority. *Wofford v. Highway Commission*, 263 N.C. 677, 683, 140 S.E.2d 376, 381 (1965).

¶ 14 We conclude that no substantial evidence exists in the record to support the trial court's finding that the Newsons intended to offer, expressly or by implication, Country Lane *to the public*. Rather, the 1952 Plat and other documents filed contemporaneously demonstrate that the Newsons intended to create Country Lane as a *private* appurtenant easement for the benefit of the subdivided 7.585-acre tract and the to-be-developed Country Colony tract.

¶ 15 Specifically, no evidence tends to show the Newsons expressly offered to dedicate Country Lane for public use. The 1952 Plat merely identifies Country Lane as a "R/W," meaning right-of-way, without any express indication that the right-of-way was dedicated for public use. The trial court did determine, though, that the Newsons *impliedly* offered for dedication Country Lane when they recorded the 1952 Plat.

¶ 16 Our Supreme Court has recognized that where an owner of land files a plat showing land subdivided "into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets . . . [to] the public." *Blowing Rock v. Gregorie*, 243 N.C. 364, 367, 90 S.E.2d 898, 901 (1956). However, our Supreme Court has also recognized that an owner filing a plat may be deemed to have granted a private easement solely to the adjacent landowners and *not* a grant to the public:

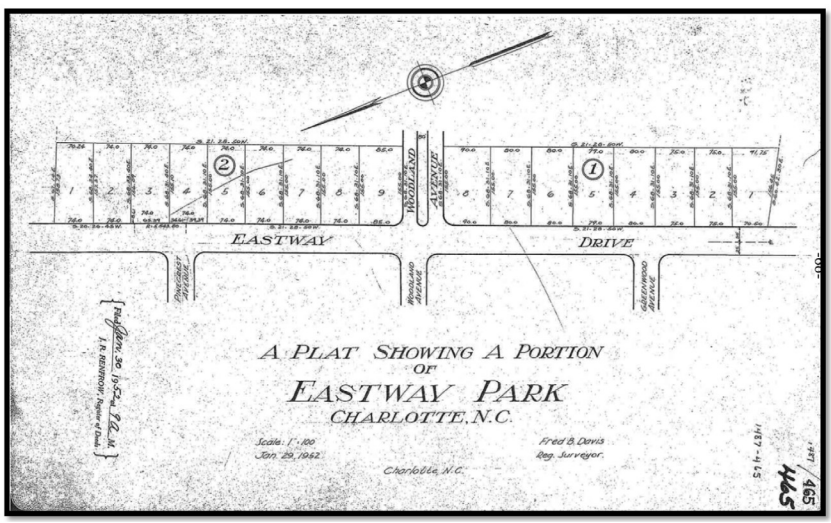
> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets,

3. If an easement is created for the benefit of the property owners within the development only, such grant is not technically a "dedication." That is, the term "dedication" technically refers to a grant of rights to the public at large. It is not the appropriate term when referring to the creation of *private* easement rights.

> parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant.

Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citations omitted).

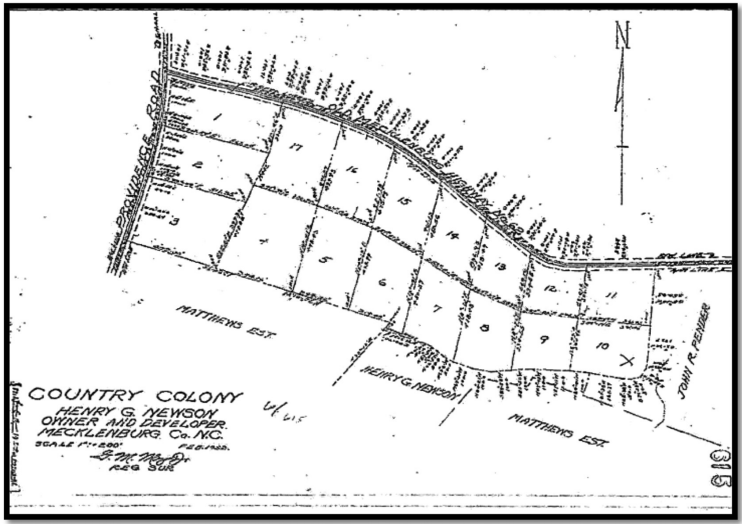
¶ 17 In reaching its determination that the Newsons intended an offer *to the public* when they recorded the 1952 Plat, the trial court relied on "expert" testimony. The opinion was essentially that the manner in which the 1952 Plat and another plat filed the same year laying out the 17 lots of Country Colony was the manner in which real estate developers during that time would go about dedicating a street *to the public*. We conclude, however, while expert opinion is admissible on the proper legal interpretation of recorded real estate documents, the "expert" opinion offered at the trial below was clearly not reliable. Specifically, the plats upon which the expert opinion was based are materially different from the 1952 Plat. The plats relied upon depicted subdivisions where the property lines for the lots did not extend to the center line of the streets. Rather, the streets depicted were not part of any lot to be sold. And no lots were sold in those subdivisions which included ownership of any part of the streets depicted on the plats. Below is one of the plats relied upon by the expert; specifically, a plat from 1952 depicting the Eastway Park subdivision in Charlotte, recorded in Map Book 1487, Page 465 in the Mecklenburg County Registry:



It could certainly be "implied" from the above plat that the developer of Eastway Park intended the streets depicted to be open to the public, in large part because these streets are not part of anyone's private lot. The other plats the expert relied upon also depict streets that are not part of any lot that was sold.[4]

¶ 18 The 1952 Plat that created Country Lane, though, depicts the boundary line subdividing the 7.585-acre tract from the 57 acres which would become Country Colony running down the middle of the Country Lane right-of-way. Again, this 1952 Plat was recorded in January 1952. A month later, in February 1952, when the Newsons actually conveyed the 7.585-acre tract to the Penders, the deed description included half of the Country Lane right-of-way, describing a boundary as running along "the center of Country Lane."

¶ 19 Also in February 1952, the Newsons filed another plat depicting the to-be-developed Country Colony subdivision. This map of Country Colony provides further proof that the Newsons did not intend to dedicate Country Lane to the public. This map shows Country Colony's 17 lots (including Lot 10 now owned by Plaintiffs). It depicts the 7.585-acre tract adjacent to Country Colony as land owned by "John R. Pender." But this plat does not show the Country Lane right-of-way. The Country Colony subdivision plat is shown below.



4. These other plats include (1) a plat recorded in 1952 in Map Book 1487, Page 457, showing Shamrock Gardens subdivision; (2) a plat recorded in 1952 in Map Book 1487,

¶ 20 We further note that the Newsons could not have intended to dedicate Country Lane to the City of Charlotte, as this area of Mecklenburg County was not annexed into the City of Charlotte until the 1980s, decades after the 1952 Plat was recorded. All of the trial court's findings regarding the City's involvement with Country Lane concern events that occurred after 1980.

B. The 1952 Plat Did Create Private Easement Rights

¶ 21 We conclude that the recording of the 1952 Plat in January 1952, and the conveyance of the 7.585-acre tract to the Penders referencing the 1952 Plat the following month, created private easement rights in Country Lane. *See Hobbs*, 261 N.C. at 421, 135 S.E.2d at 36.

¶ 22 It is true that when the Newsons later sold lots in Country Colony, none of the deeds conveying these lots ever referred to the 1952 Plat. Rather, those deeds referred to the *Country Colony map*, which does not depict Country Lane. However, before the Newsons ever conveyed any lot in Country Colony, they conveyed the 7.585-acre tract to the Penders by deed which did reference the 1952 Plat.

¶ 23 Based on *Hobbs* and other Supreme Court jurisprudence, we hold that the conveyance of the 7.585-acre tract by the Newsons to the Penders included, by implication, private easement rights in Country Lane for the benefit of the 7.585-acre tract and reserved private easement rights in Country Lane for the tract which would later become Country Colony for the lots fronting on Country Lane. Accordingly, when the Newsons later conveyed lots in Country Colony (including Lot 10 now owned by Plaintiffs), the grantees of those lots along Country Lane took *subject to* the appurtenant easement rights of the owner(s) of the 7.585-acre tract. Likewise, these grantees received appurtenant easement rights to the portion of Country Lane on the other side of the boundary line of the 7.585-Acre tract.

C. Current Rights in Country Lane

¶ 24 Having concluded that the predecessors-in-title to Plaintiffs' lot and Defendant's three lots had appurtenant easement rights in Country Lane, we next consider whether those rights still exist.

¶ 25 Private easement rights may be extinguished in a number of ways. For instance, such rights may be extinguished by abandonment, *see Miller v. Teer*, 220 N.C. 605, 612, 18 S.E.2d 173, 178 (1942), by the servient

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Page 461, showing land being subdivided into two lots; and (3) a plat recorded in 1952 in Map Book 1487, Page 463, showing Lakeview Park subdivision.

owner's adverse use for twenty years, *see Duke Energy Carolinas, LLC v. Gray*, 369 N.C. 1, 7, 789 S.E.2d 445, 449 (2016), or by the Marketable Title Act, *see* N.C. Gen. Stat. § 47B-2 (2018) (stating if a property owner has an unbroken chain of title dating back thirty years, earlier rights and interests in the land are extinguished, barring a few exceptions).

¶ 26 Here, the trial court, as factfinder, found that "[t]here was no evidence that any portion of Country Lane has been abandoned by [any of the parties]." No party challenges this finding as erroneous. Therefore, it is binding on appeal.

¶ 27 Plaintiffs, though, argue that Defendant lost any right to use the portion of Country Lane located on their Lot 10 based upon operation of the Marketable Title Act. We disagree.

¶ 28 This Act provides that an owner of land takes free of nonpossessory interests that others may have but which do not appear in the owner's chain of title going back thirty (30) years. N.C. Gen. Stat. § 47B-2. Here, the trial court found that Defendant (and her family) have been continuously using the gravel road since 1966 which Plaintiffs blocked in 2018. Based on this finding, we conclude that Defendant's private easement rights in the portion of Country Lane on Plaintiffs' Lot 10 have not been extinguished by operation of the Marketable Title Act. We so conclude based on an exception under N.C. Gen. Stat. § 47B-3(3), which provides that the Act shall not affect or extinguish "interests [or] claims . . . of any person who is in present, actual and open possession of the real property so long as such person is in such possession."

¶ 29 Plaintiffs argue that they own one of the gravel roads based on the theory of adverse possession. We presume that Plaintiffs are contending that they now have fee simple rights to all portions of this road, including the portions on Defendant's lot. We reject this argument as there is no evidence that this use was hostile, as in, exclusive. *See State v. Brooks*, 275 N.C. 175, 180, 166 S.E.2d 70, 73 (1969) (recognizing that an element of adverse possession is that the possession must be "hostile"). Rather, Plaintiffs' use of this road was not hostile, as they have always had private easement rights to this road, as it lies within Country Lane, and the evidence showed that Defendant used the road.

¶ 30 We do not address whether the parties, or some of them, may have lost easement rights in the undeveloped portions of Country Lane (areas where there is no gravel road established) where it could be shown that the fee simple owner of said portions denied access to the easement owner(s). The trial court made no findings in this regard, and no party

has made any argument on appeal that rights in undeveloped portions of Country Lane have been lost through adverse possession.

V. Conclusion

¶ 31 The trial court correctly concluded that the parties have the right to use Country Lane but that the court erred in its reasoning. Specifically, the trial court erred in concluding that Country Lane is a public road based upon the 1952 Plat. Notwithstanding, we conclude that the parties have private, appurtenant easement rights in Country Lane. No party may interfere with the easement rights in Country Lane of the other parties.

¶ 32 Accordingly, we reverse the trial court's order declaring Country Lane to be a public street or road. We, otherwise, affirm the trial court's order declaring the parties' rights in Country Lane, but for the reason that each adjoining property owner was granted and possesses private, appurtenant easement rights to the other parties' lots within the Country Lane right-of-way.

AFFIRMED AS MODIFIED IN PART, REVERSED IN PART, AND REMANDED

Judges TYSON and ARROWWOOD concur.

FMSH L.L.C., PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION, RESPONDENT

AND

SENTARA ALBEMARLE REGIONAL MEDICAL CENTER, LLC, AND SENTARA HEALTHCARE, RESPONDENT-INTERVENORS

No. COA20-102

Filed 7 September 2021

Hospitals and Other Medical Facilities—certificate of need—exemption from review process—legacy medical care facility—acquisition or reopening

In a certificate of need (CON) case in which an applicant gave notice of its intent to reopen an ambulatory surgery center that was issued two CONs under its prior owner but then closed—a facility

that the applicant argued was exempt from CON review as a legacy medical care facility—the determination by the Department of Health and Human Services that N.C.G.S. § 131E-184(h) required the applicant to first acquire legal ownership of the facility before obtaining a CON constituted a reasonable statutory interpretation within the agency's authority (in particular, of the phrase "acquire or reopen"). Where the administrative law judge (ALJ) failed to defer to the agency's decision when it ordered the agency to transfer the previously-issued CONs to the applicant, its decision was reversed and the matter remanded for entry of summary judgment in favor of the agency and the facility's current owner.

Appeal by Respondents from Final Decision entered 9 October 2019 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 12 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney Generals Bethany A. Burgon and Kimberly Randolph, and Fox Rothschild LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for the Respondent- and Respondent-Intervenor-Appellants.

FMSH, L.L.C., by Managing Member Catherine Fleming, pro se.

Wyrick Robbins Yates & Ponton LLP, by Frank Kirschbaum and Charles George, for amicus curiae The County of Franklin, North Carolina.

Nelson Mullins Riley & Scarborough LLP, by Denise M. Gunter and Chelsea K. Barnes, for amicus curiae FirstHealth of the Carolinas, Inc.

Poyner Spruill, LLP, by Matthew Fisher, for amici curiae NCHA, Inc., and North Carolina Baptist Hospital.

K&L Gates, LLP, by Gary Qualls and Susan Hackney, for amici curiae University Health Systems of Eastern Carolina, Inc. d/b/a Vidant Health and The Outer Banks Hospital, Inc.

Fox Rothschild, LLP, by Terrill Johnson Harris, for amici curiae The Moses H. Cone Memorial Hospital Operating Corporation and The Moses H. Cone Memorial Hospital.

GRIFFIN, Judge.

¶ 1 Respondent Healthcare Planning and Certificate of Need Section of the North Carolina Department of Health and Human Services (the "Agency") and Respondent-Intervenors Sentara Albemarle Regional Medical Center, LLC, and Sentara Healthcare (together, "Sentara") appeal from the final decision of an administrative law judge in the Office of Administrative Hearings directing the Agency to transfer two Certificates of Need authorizing operation of a Legacy Medical Care Facility from Sentara to Petitioner FMSH, L.L.C. ("FMSH"). The final decision held that FMSH could not be required to acquire the physical facilities previously operated under the Certificates of Need as a condition precedent to its receipt of the Certificates of Need. We reverse the final decision and remand for entry of an order granting summary judgment to the Agency and Sentara.

I. Factual and Procedural History

¶ 2 The Sentara Kitty Hawk Ambulatory Surgery Center ('the Facility") was a multi-specialty ambulatory surgery facility operated from 1989 to 2017 in Kitty Hawk. In 1989, the Agency issued a Certificate of Need ("CON") to Regional Medical Services, Inc. ("RMS"), for the establishment of an ambulatory surgery facility at 5200 North Croatan Highway in Kitty Hawk. In 2002, the Agency issued to RMS a second CON authorizing RMS to open a diagnostic center at the Facility. Together, the two CONs allowed RMS to maintain two operating rooms and diagnostic equipment within the Facility.

¶ 3 In late 2013 or early 2014, Sentara acquired all of RMS's assets regarding the Facility, including the CONs, and continued operating the Facility. In late 2017, Sentara closed the Facility. At the time of the administrative hearing in this case, Sentara had no plans to reopen or resume operation of either the ambulatory facility or diagnostic center portion of the Facility.

¶ 4 On 25 June 2018, FMSH notified the Agency that it intended to reopen the Facility. FMSH proposed that its intended reopening of the Facility was exempt from the CON review process because the Facility qualified as a "Legacy Medical Care Facility ["LMCF"]" under N.C. Gen. Stat. 131E-184(h). At the time of its request, FMSH had no legal interest in the Facility, and had not contacted Sentara about purchasing or reopening the Facility.

¶ 5 On 31 January 2019, the Agency advised FMSH by response letter that it agreed FMSH's "proposal [was] exempt from [CON] review under N.C. Gen. Stat. § 131E-184(h)." The Agency further stated that it knew FMSH had not entered into any negotiations to purchase the Facility

from Sentara, and that it would not "knowingly issue [an] exempt from review determination[] for [a] hypothetical proposal[] to acquire an existing health service facility." The Agency informed FMSH that its request to reopen the Facility would be exempt from the CON review process under two conditions: First, FMSH was required to legally acquire the Facility from Sentara. Second, FMSH would be required to reopen the Facility by 24 June 2021, within thirty-six months of FMSH's written notice of intent to reopen.

¶ 6 FMSH filed a petition for a contested case hearing which challenged the Agency's two conditions for exemption approval. FMSH and the Agency each moved for summary judgment. On 9 October 2019, an administrative law judge ("ALJ") entered a Final Decision from the Office of Administrative Hearings, determining that the Agency did not have the authority to impose its first condition requiring FMSH to acquire a legal interest in the Facility. The Final Decision granted summary judgment to FMSH and directed the Agency to transfer the CONs from Sentara to FMSH. The Agency and Sentara timely appeal.

II. Analysis

¶ 7 The Agency and Sentara argue that, by granting summary judgment in FMSH's favor, the ALJ reached an "impermissible" decision which "fail[ed] to defer to the Agency's interpretation, which [was] reasonable and consistent with the language of the statute." We agree.

¶ 8 We review an ALJ's final decision granting summary judgment *de novo*, considering all evidence presented in the light most favorable to the non-moving party. *Blue Ridge Healthcare Hosps. Inc.*, *v. N.C. Dep't of Health & Hum. Servs.*, *Div. of Health Serv. Regul.*, *Healthcare Plan. & Certificate of Need Section*, 255 N.C. App. 451, 455–56, 808 S.E.2d 271, 274 (2017) (citations omitted). Summary judgment is properly granted if the record shows "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Ron Medlin Const. v. Harris*, 364 N.C. 577, 580, 704 S.E.2d 486, 488 (2010) (citation and quotation marks omitted); N.C. R. Civ. P. 56(c). A Court reviewing the final decision of an ALJ may "affirm the decision[,]" "remand the case for additional proceedings[,]" or "reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . (4) [a]ffected by . . . error of law[.]" N.C. Gen. Stat. § 150B-51(b) (2019).

¶ 9 Our analysis begins by acknowledging that no issues of material fact were present in the Record before the ALJ. The parties agreed on the material facts of the case in their pleadings in the contested hearing

below, and each motioned for the ALJ to determine the case in their favor as a matter of law. The only issue before this Court is whether the ALJ properly construed the relevant statutory authority.

¶ 10 The Agency initially determined that it would not issue an exemption to "reopen" the Facility without CON review because FMSH did not own it and required FMSH to first "acquire" the Facility by acquiring legal ownership of the Facility from Sentara. The ALJ held that the Agency had misinterpreted the statutory meaning of "acquire or reopen" as the terms are used in N.C. Gen. Stat. § 131E-184(h). The question, then, is whether section 131E-184(h) requires a party who intends to "acquire or reopen" a LMCF to first have legal ownership of that facility.

¶ 11 Chapter 131E of the North Carolina General Statutes details the purpose of North Carolina's CON law and the review process by which the Agency may determine the need for and distribute CONs. Upon its determination that a geographical area is in need of health services, the Agency first establishes a schedule of time in which it will receive applications from entities that offer to provide the needed services. N.C. Gen. Stat. §§ 131E-177, 131E-182 (2019). Applicant-entities then submit applications to the Agency describing the entity's plan to fulfill certain criteria, including: how the area's health service need will be fulfilled; which population will be served and why that population needs service; how increased health service competition will affect the service area; and what is the availability of human and financial resources to accommodate the plan. N.C. Gen. Stat. § 131E-183 (2019).

¶ 12 The Agency reviews submitted applications for a period of up to ninety days. During this time it may solicit or receive written comments and/or conduct public hearings to discuss the applications. N.C. Gen. Stat. § 131E-185 (2019). This review period may be extended by up to sixty days if additional information is requested from the applicants. N.C. Gen. Stat. § 131E-185(c). The Agency then issues a written decision to "approve," "approve with conditions," or "deny" each application, outlining its findings, conclusions, and criteria used. N.C. Gen. Stat. § 131E-186 (2019). The Agency ordinarily issues a CON to an applicant-entity within thirty-five days of its decision to approve, or approve with conditions, the application. N.C. Gen. Stat. § 131E-187(c)(1) (2019). However, the issuance of a CON may be delayed indefinitely by an applicant's filing of a contested case hearing challenging the Agency's decision. N.C. Gen. Stat. § 131E-187 (2019).

¶ 13 The routine CON review process is statutorily sanctioned to take between 125 and 190 days. At the end of this process, an entity which

receives or "subsequently acquire[s], in any matter whatsoever permitted by law[,]" a CON is thereafter "required to materially comply with the representations made in its application for that [CON]." N.C. Gen. Stat. § 131E-181(b) (2019).

¶ 14 A CON may be transferred or reassigned by an active health service provider, but only if the transfer or reassignment complies with the terms of N.C. Gen. Stat. § 131E-189(c). N.C. Gen. Stat. § 131E-181(a). The transfer or reassignment of a CON by an active health service provider does not require the recipient to undergo the full CON review process. N.C. Gen. Stat. § 131E-184(a)(8) (2019) ("[T]he [Agency] shall exempt from [CON] review a new institutional health service if it receives prior written notice from the entity proposing . . . [t]o acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition.").[1] Rather, the recipient-entity "will be subject to the requirement that the service be provided consistent with the representations made in the application and any applicable conditions the [Agency] placed on the [CON]." N.C. Gen. Stat. § 131E-189(c) (2019); *see* N.C. Gen. Stat. § 131E-190(i) (2019) (subjecting CON holder to civil suit for "operating a service which materially differs from the representations made in its application for that [CON]").

¶ 15 An entity may also obtain a CON to operate a health facility without undergoing the usual CON review process if it meets one of the other exemptive criteria in N.C. Gen. Stat. § 131E-184. Under section 131E-184(h), relevant to this appeal, the Agency "must exempt from [CON] review the acquisition or reopening of a [LMCF]." N.C. Gen. Stat. § 131E-184(h) (2019). A "LMCF" is defined in chapter 131E as a facility that (1) "[i]s not presently operating[,]" (2) [h]as not continuously operated for at least the last six months[,]" and (3) was operated within the last twenty-four months by a licensed operator for the primary purpose of offering diagnostic, therapeutic, or rehabilitative services. N.C. Gen. Stat. § 131E-176(14f) (2019). Section 131E-184(h) also requires the entity to provide the Agency with written notice of how, where, and when it intends to operate the LMCF:

> The person seeking to operate a [LMCF] shall give the [Agency] written notice of all of the following:
>
> (1) Its intention to acquire or reopen a [LMCF] within the same county and the same service area as the

1. *Cf.* Fla. Stat. §§ 408.036, 408.042 (2019) (requiring the transfer of a CON to undergo an expedited review process verifying the recipient's financial resources).

> facility that ceased continuous operations. If the [LMCF] will become operational in a new location within the same county and the same service area as the facility that ceased continuous operations, then the person responsible for giving the written notice required by this section shall notify the [Agency], as soon as reasonably practicable and prior to becoming operational, of the new location of the [LMCF]. For purposes of this subdivision, "service area" means the service area identified in the North Carolina State Medical Facilities Plan in effect at the time the written notice required by this section is given to the Department.
>
> (2) That the facility will be operational within 36 months of the notice.

N.C. Gen. Stat. § 131E-184(h).

¶ 16 The "cardinal principle" of statutory construction is "to give effect to the legislative intent." *State v. Tew*, 326 N.C. 732, 738–39, 392 S.E.2d 603, 607 (1990). This Court strives to give "the language of the statute its natural and ordinary meaning unless the context requires otherwise." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citation and quotation marks omitted). "Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Id.* (citation and quotation marks omitted). When engaging in judicial construction, this Court ascertains legislative intent by considering "the purpose of the statute and the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *Tew*, 326 N.C. at 738–39, 392 S.E.2d at 607.[2]

> All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation. *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E.2d 289 (1968). A construction of a statute which operates to defeat or impair its purpose must

2. "These rules apply to both criminal and civil statutes." *Tew*, 326 N.C. at 739, 392 S.E.2d at 607.

> be avoided if that can reasonably be done without violence to the legislative language. *State v. Hart*, 287 N.C. 76, 213 S.E.2d 291 (1975). Individual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978).

Id.

¶ 17 We agree with the ALJ's assessment that there is little ambiguity in section 131E-184(h) on its face. "Acquire" and "reopen" are each terms with ordinary usages, and each appear to be used in their ordinary way. Neither "acquire" nor "reopen" is defined within section 131E-184. Section 131E-176, the definitions statute for chapter 131E, also does not define the terms "acquire" and "reopen." *See* N.C. Gen. Stat. § 131E-176 (2019). "Acquire" is ordinarily defined as "to get as one's own." *Acquire*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/acquire (last visited Aug. 18, 2021). "Reopen" naturally means "to open again." *Reopen*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/reopen (last visited Aug. 18, 2021). Any ambiguity in these terms arises from the particular legal effect of the words when used together in the statute, and in the phrase "acquire *or* reopen." Notably, this phrase signals an implicit contrast between the two terms.

¶ 18 The ALJ's decision focuses, in large part, on the implicit contrast that the word "or" creates between "acquire" and "reopen." Under the ALJ's view, making the acquisition of a facility a condition precedent to an entity's ability to reopen that facility (as the Agency interpreted the statute) would change the plain meaning of the statutory language from "acquire *or* reopen" to "acquire *and* reopen." The Final Decision states, *inter alia*:

> Clearly, the language [of N.C. Gen. Stat. § 131E-184(h)] is a directive to the Agency that it "must exempt from [CON] review" without qualification. The question then becomes what is exempt. The answer is the "acquisition or reopening" of a [LMCF]. The statute specifically applies to the acquisition or reopening of a "facility." It specifically does not speak to the acquisition of anything else in particular, including the actual [CON].
>
> . . . .

> According to [the Agency and Sentara], regarding a [LMCF], a person cannot "reopen" a facility that they do not own. They contend that the exemption "affords providers a finite time period in which to either exercise their right to reopen a [LMCF], or to transfer the facility to someone else who will operate it as permitted by the CON law."
>
> This interpretation changes the plain meaning of the statute from "acquire *or* reopen" to "acquire *and* reopen." . . . .
>
> To rule with [the Agency and Sentara], one must conclude that the [LMCF] exemption was enacted to protect the financial interests of the entity that has failed and given up the provision of health care services to that service area. To put control of health care services in the hands of a failed business and for that entity to be able to hold up the provision of those services for two years, rather than the healthcare needs of North Carolinians in rural communities, is an absurdity.

¶ 19 We disagree with this interpretation. The statute specifically does "speak to the acquisition of . . . the actual [CON]." The language of section 131E-184(h) illustrates an instance where an entity may acquire a CON without undergoing the usual CON review process: when that entity intends to acquire or reopen a LMCF. Under this specific statute, the acquisition of a CON is tied to the entity's possession of a previously established and constructed health services facility. Under the initial CON review process, an applicant-entity whose application is approved is given a reasonable time to construct its facility following that approval and may not begin constructing a facility before CON approval. *See* N.C. Gen. Stat. §§ 131E-189, 131E-190(b).

¶ 20 The act of using an awarded CON and engaging in the provision of medical services is acknowledged by section 131E-184(h) in the word "operate." N.C. Gen. Stat. § 131E-184(h) ("The person seeking to *operate* a [LMCF] shall give the [Agency] written notice of . . . [i]ts intention to acquire or reopen a [LMCF][.]" (emphasis added)). In its flawed interpretation, the ALJ assigns the pragmatic role of "operating" the facility to the word "reopen." The Agency's interpretation does not alter the plain meaning of the statute from "acquire *or* reopen" to "acquire *and* reopen." Rather, this interpretation reveals the statute's contemplation

of two distinct avenues to operating a LMCF: "acquire and operate" *or* "reopen and operate." Which avenue is available to an entity stems from the entity's legal right to the facility at the time the Agency initially issued the CON. If we accept the ALJ's interpretation, it would require us to read "acquire" to mean "obtain and not use" and read "reopen" to mean "open again and operate;" there would then be no need for the legislature to have included the word "operate" earlier in the statute. *See N.C. Dep't of Correction v. N. C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used."). The ALJ's view contemplates a world where an entity may evoke section 131E-184 to simply acquire the facility without an intent to actually operate it. Such a world is a legal nullity because the entity's intent to operate the LMCF is a previously addressed, material component of section 131E-184(h).[3]

¶ 21 When reading the sections of chapter 131E outlining the general CON review process *in pari materiae*, it becomes clear that the intent of section 131E-184 as a whole is to alleviate the need to undergo a minimally 125-day, investigatory review period before an entity may operate a healthcare facility in specifically enumerated circumstances. The LMCF exemption in section 131E-184(h) acknowledges that, where an entity and its licensed facility have previously passed scrutiny and intend to once again offer those services in the same manner and form, there is less risk that the new services will not pass scrutiny when services are resumed. Written notice under section 131E-184(h) does not trigger the same regiment of comments, hearings, and extensive review that is necessitated under section 131E-185.

¶ 22 If the entity who wishes to operate the facility is the same entity who owns or has acquired the facility, that entity would be bound to adhere to "the representations made in the application and any applicable conditions the [Agency] placed on the [CON]." N.C. Gen. Stat. § 131E-189(c). Likewise, there would be a single, easily identifiable

3. The ALJ's Final Decision alludes to three other instances where N.C. Gen. Stat. § 131E-184(h) has been used by an applicant-entity but does not provide citations to these instances. The ALJ contends that, in two of these cases, the entity invoking section 131E-184(h) actually acquired, in the ordinary meaning of the term, the subject LMCF and then never operated it. We note that the fact that an entity may have acquired and never operated an LMCF under the statute does not eliminate the materiality of that entity's expressed intent to operate the LMCF in order to first qualify for exemption from CON review—it means only that the entity did not follow through with the intent expressed in its notice to the Agency.

entity with a legal claim to the facility. The ALJ's interpretation leaves open a significant question to be answered in a subsequent case: If an entity does not need to first own a LMCF before it is given a CON to operate that LMCF, and multiple entities all notify the Agency of their intent to operate that LMCF, which entity is awarded the CON? Developing an answer to this hypothetical question in the present case would be advisory, but consideration of the hypothetical reveals a pivotal concern in the ALJ's interpretation. If multiple entities all expressed an intent to operate the LMCF, the Agency would need to undergo some additional review process to determine which entity is awarded the CON for the LMCF. The need for additional, perhaps attenuated review defeats the legislative intent of section 131E-184—to avoid a bidding war when the circumstances have a unique set of situational characteristics.

¶ 23 The ALJ refers to the Agency's decision as effecting an "absurdity," asserting that an adoption of the Agency's interpretation would necessitate holding that the legislative intent of section 131E-184(h) was to protect the financial interests of a failed business entity. We disagree. Rather, it would be an "absurdity" to force a new entity to give a failed business an economic windfall by buying their assets, but it would be equally absurd to allow a new entity to step into the shoes of another entity, take on the economic benefits of operating a health service facility, and obtain a CON without paying for the privilege to avoid the associated burdens first.

¶ 24 Finally, we note that the language of section 131E-184(h) allows an entity to physically relocate the LMCF that it intends to "acquire or reopen." We do not find section 131E-184(h)'s acknowledgement that the LMCF may "become operational in a new location within the same county and the same service area as the facility that ceased continuous operations" to conflict with our holding in this case. *See* N.C. Gen. Stat. § 131E-184(h). After acquiring the subject LMCF, including the facility itself and the associated assets which were amassed under the scrutiny of CON review, the operating entity may exercise its ownership rights and move its property to a new location.

¶ 25 We hold that N.C. Gen. Stat. 131E-184(h) requires an entity which wishes to operate a LMCF to either already own and "reopen" that facility or to "acquire" legal ownership of the facility prior to operating it. When we construe all of chapter 131E together as a whole, the statutory language shows our General Assembly intended for the LMCF exemption to function as a shortcut around the normal CON process where the circumstances inherently guarantee a substantially similar level of healthcare services would be provided to the same geographical area.

The only way this can occur without additional, considerable review by the Agency is if the entity who wishes to operate a closed LMCF first steps into the shoes of the LMCF's prior operator and acquires the LMCF—a facility which previously endured scrutiny under the normal CON process and received clearance to operate.

III. Conclusion

¶ 26 We hold that the ALJ's final decision was reached upon an erroneous construction of the law. We reverse the ALJ's decision and remand for entry of an order granting the Agency and Sentara's motion for summary judgment, denying FMSH's motion for summary judgment, and requiring FMSH to first acquire Sentara's interests in the Facility before obtaining a CON under section 131E-184(h) and operating the Facility.

REVERSED AND REMANDED.

Judges DILLON and JACKSON concur.

IN THE MATTER OF A.L.

No. COA21-245

Filed 7 September 2021

Child Abuse, Dependency, and Neglect—permanency planning order—eliminating reunification—appeal—premature

A mother's appeal from a permanency planning order ceasing reunification efforts with her daughter was dismissed without prejudice because the appeal was premature under the provisions of N.C.G.S. § 7B-1001(a)(5)(a). Although the mother properly filed written notice preserving her right to appeal the order, pursuant to subsection (a)(5)(a)(1), she filed her notice of appeal from the order before the sixty-five-day period required by subsection (a)(5)(a)(2) had elapsed.

Appeal by respondent-mother from order entered 10 December 2020 by Judge Vanessa E. Burton in Robeson County District Court. Heard in the Court of Appeals 24 August 2021.

J. Edward Yeager, Jr., for petitioner-appellee Robeson County Department of Social Services.

IN RE A.L.

[279 N.C. App. 168, 2021-NCCOA-452]

Robert C. Montgomery for guardian ad litem.

Peter Wood for respondent-appellant mother.

ZACHARY, Judge.

¶ 1 Respondent-Mother appeals from a permanency planning order ceasing reunification efforts with her daughter, A.L.,[1] arguing that the trial court abused its discretion by impermissibly delegating to the foster parents ("Guardians") the court's responsibility for determining the terms of Respondent-Mother's supervised visitation. Because we conclude that Respondent-Mother's appeal is premature and therefore untimely, we dismiss the appeal without prejudice.

I. Background

¶ 2 On 18 July 2019, Petitioner Robeson County Department of Social Services ("DSS") filed a juvenile petition alleging A.L. to be a neglected juvenile. The case came on for an adjudicatory hearing on 30 October 2019, and the trial court adjudicated A.L. as neglected pursuant to an order entered 21 November 2019. The trial court conducted a dispositional hearing immediately following the adjudication and ordered that A.L. be placed in the legal and physical custody of DSS, with a primary plan of reunification with Respondent-Parents.[2]

¶ 3 The matter came on for a permanency planning hearing on 9 September 2020. The trial court found that because of A.L.'s health problems, "it would be unsuccessful to attempt to continue to reunite the parents with the juvenile[.]" A.L. "needs a kidney transplant and she cannot be and will not be considered for a transplant if the plan is for reunification to her parents who have consistently failed to show significant substantial improvement in the care of their child." The trial court, therefore, changed the primary plan to guardianship, and ordered that legal and physical custody of A.L. continue with DSS.

¶ 4 On 12 November 2020, the trial court conducted a review hearing. By order entered 10 December 2020, the trial court ordered, *inter alia*:

> 1. That legal guardianship of [A.L.] shall be awarded to [Guardians] and there shall be no need for further review in this matter.

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1. To protect the identity of the minor child, we refer to her by initials.

2. Respondent-Father is not a party to this appeal; he passed away prior to the entry of the order that is the basis of this appeal.

. . . .

> 3. That [Respondent-Parents] shall have supervised visitation with [A.L.] the first Sunday of each month from 12:00 p.m. to 2:00 p.m. [Respondent-Parents] must give a 48 hour notice of their intent to visit and if [Respondent-Parents] are more than 30 minutes late, [Guardians] are not required to wait.

¶ 5 Respondent-Mother filed the statutorily required notice to preserve her right to appeal the trial court's 10 December 2020 review order, N.C. Gen. Stat. § 7B-1001(a)(5)(a)(1) (2019), and on 6 January 2021, Respondent-Mother filed notice of appeal to this Court.

II. Jurisdiction

¶ 6 Prior to the entry of a final order, a parent may appeal from a permanency planning order that eliminates reunification as a primary plan only under certain prescribed circumstances:

> 1. [The parent h]as preserved the right to appeal the order in writing within 30 days after entry and service of the order[,]
>
> 2. [a] termination of parental rights petition or motion has not been filed within 65 days of entry and service of the order[, and]
>
> 3. [a] notice of appeal of the order eliminating reunification is filed within 30 days after the expiration of the 65 days.

N.C. Gen. Stat. § 7B-1001(a)(5)(a).

¶ 7 Here, after the trial court ceased reunification as a primary plan, Respondent-Mother filed a written notice preserving her right to appeal the trial court's order, pursuant to N.C. Gen. Stat. § 7B-1001(a)(5)(a)(1). However, when Respondent-Mother subsequently filed notice of appeal from the trial court's 10 December 2020 review order on 6 January 2021, the 65-day period required by N.C. Gen. Stat. § 7B-1001(a)(5)(a)(2) had not yet elapsed. *See id.* § 7B-1001(a)(5)(a)(2). Moreover, there is no indication in the appellate record that a petition to terminate Respondent-Mother's parental rights had been filed. *See id.* As such, Respondent-Mother's appeal is premature and untimely. *See In re A.R. & C.R.*, 238 N.C. App. 302, 305, 767 S.E.2d 427, 429 (2014) (interpreting an earlier version of N.C. Gen. Stat. § 7B-1001(a)(5)—which provided 180 days, rather than 65, within which to initiate a termination of

parental rights proceeding—and concluding that the statute "operates . . . to delay the date from which notice of appeal may be taken").

¶ 8 In addition, Respondent-Mother has not petitioned this Court for a writ of certiorari, and the record before us fails to affirmatively establish our jurisdiction to consider the merits of Respondent-Mother's appeal. Accordingly, we must dismiss Respondent-Mother's appeal.

III. Conclusion

¶ 9 For the foregoing reasons, we dismiss Respondent-Mother's appeal without prejudice to her right to refile her appeal as allowed by N.C. Gen. Stat. § 7B-1001(a)(5)(a). *See In re D.K.H.*, 184 N.C. App. 289, 291–92, 645 S.E.2d 888, 890 (2007).

DISMISSED.

Judges MURPHY and GORE concur.

DANIEL S. ISOM, Plaintiff
v.
JANEE A. DUNCAN, Defendant

No. COA20-320

Filed 7 September 2021

Child Visitation—denied—best interests of child—findings and evidence—unwillingness to obey court orders

The trial court did not err by denying a mother visitation with her minor daughter where the trial court's conclusion that visitation with the mother was not in the daughter's best interests was supported by the findings of fact, which were supported by substantial evidence (even after excluding findings that were not supported by the evidence)—including that the mother showed she was unwilling to obey the orders of the trial court, she had a history of running from authorities and concealing her child, she had caused significant disruptions during visits with her daughter, and she had homicidal and suicidal thoughts.

Appeal by Defendant from order entered 28 May 2019 by Judge Robert J. Crumpton in Wilkes County District Court. Heard in the Court of Appeals 13 April 2021.

Tharrington Smith, L.L.P., by Steve Mansbery, for plaintiff-appellee.

Anné C. Wright for defendant-appellant.

MURPHY, Judge.

¶ 1 We review custody orders to ensure the findings of fact are supported by substantial evidence, and the conclusions of law are supported by the findings of fact. When a finding of fact is unchallenged, it is binding on appeal. Here, the trial court did not err in concluding that prohibiting the mother from exercising visitation with the minor child is in the minor child's best interests because this conclusion is supported by the findings of fact that are supported by substantial evidence in the Record.

BACKGROUND

¶ 2 The minor child, Paula,[1] was born on 28 January 2011 to Mother Defendant-Appellant Janee A. Duncan ("Mother") and Father Plaintiff-Appellee Daniel S. Isom ("Father"). Father and Mother were involved in a romantic relationship before Paula's birth while they were college students in Tennessee but were never married. The couple broke up before Paula was born. Father did not meet Paula until September 2016, when she was five-and-a-half years old, due to Mother hiding Paula from Father and intentionally evading court orders.

¶ 3 The parties' custody battle began in January 2012, when the Hamilton County Superior Court in Indiana ("Indiana Court") entered its *Order Establishing Paternity, Parenting Time, Custody and Support* ("January 2012 Order"). The Indiana Court awarded joint legal custody of Paula to Mother and Father and ordered physical custody to be with Mother. Father was awarded parenting time with Paula pursuant to Indiana Parenting Time Guidelines. When Mother refused to grant Father visitation time with Paula, the Indiana Court entered an order on 5 March 2012 requiring Mother to appear and show cause for her failure to comply with the January 2012 Order. On 31 May 2012, Mother failed to appear at the show cause hearing and, as a result, the Indiana Court issued a *Court Order of Contempt and Writ of Body Attachment* ("May 2012 Order").

¶ 4 For approximately the next four years, Father and his family searched for Mother and Paula and were unsuccessful in locating their

1. A pseudonym is used for the minor child throughout this opinion to protect the identity of the juvenile and for ease of reading.

whereabouts. Father filed a verified emergency motion for physical custody and motion to appoint a guardian ad litem, which the Indiana Court granted in an order filed 6 September 2016 ("Indiana September 2016 Order"). In the Indiana September 2016 Order, Father was immediately granted temporary physical custody of Paula. Around the same time Father was granted temporary physical custody of Paula, Mother fled with Paula to Ohio, where she stayed with an acquaintance, Jessica Webb. Mother told Webb she "needed a place to stay because the [S]heriff in Hamilton County, Indiana came to her house looking for her and [Paula]." After witnessing Mother's behaviors, such as using a "burner phone," researching fake passports, and making Paula use fake names in public, Webb became seriously concerned for Paula's welfare and decided to contact authorities in Indiana and Ohio.

¶ 5 On 22 September 2016, the Ohio Court of Common Pleas in Washington County filed an order ("Ohio September 2016 Order") finding Mother "appears to be a flight risk" and ordering temporary custody of Paula to the Washington County (Ohio) Children Services Board ("Ohio CPS").[2] Father, having moved back to North Carolina, filed a lawsuit in Wilkes County District Court on 13 October 2016 for custody of Paula and, on the same day, the trial court entered a *Temporary Orde*r ("October 2016 Order") awarding Father temporary sole legal and physical custody of Paula, subject to Ohio CPS completing an investigation.

¶ 6 On 31 January 2017, the trial court filed an *Interim Order* ("January 2017 Order") awarding Father temporary legal and physical custody of Paula and awarding Mother limited supervised visitation for four hours on the second weekend of every month and scheduled phone and video calls with Paula. On 13 October 2017, Mother's visitation was adjusted to a minimum of one hour per week in the trial court's *Temporary Custody Order* ("October 2017 Order"), which found:

> [Mother's] actions show that she willfully and intentionally kept [Paula] from [Father]. [Mother] willfully and intentionally attempted to avoid the jurisdiction of the Indiana Courts. [Mother's] explanations for missing Court, moving, not receiving notices,

2. At this point in September 2016, both the Ohio and Indiana courts had been involved in the custody dispute and a jurisdictional issue arose that is not at issue in this appeal. Ultimately, North Carolina acquired jurisdiction in accordance with a *Jurisdictional Order* filed in Wilkes County District Court on 25 September 2017, recognizing "Wilkes County Civil District Court has personal and subject matter jurisdiction in these causes, and has authority to enter such Orders as may be necessary regarding modification of custody, child support, or otherwise regarding the minor child, [Paula]."

> discrepancies in affidavits and testimony and using false names are wholly unbelievable. Her actions were a conscious effort to keep [Father] from [Paula] and were without excuse. [Mother] ignored the authority of the Courts in Indiana. She moved to Ohio in an attempt to avoid the Court. She had [Paula] use false names to help avoid the Court. [The trial court] has no assurances that [Mother] would follow the Orders of [the trial court] if given unsupervised visitations. [Mother] argues that she has submitted to [the trial court's] jurisdiction and realizes that if she left the State in violation of an Order of [the trial court] that she could be charged with a felony and arrested. However, the Court in Indiana issued at least two separate orders for her arrest and she avoided law enforcement and the Court for 5 years.

¶ 7 Beginning in February 2017, Mother participated in supervised visits with Paula at SonShine Child Care Center, Incorporated ("SonShine Child Care") and Our House in Wilkesboro. A visitation supervisor indicated that while most visits with Mother and Paula were "appropriate," Mother violated the Our House guidelines by pulling out a camera phone and taking a photograph of a bruise on Paula. Similarly, there was an incident on 31 July 2018 at SonShine Child Care where Mother violated the facility guidelines when she let an off-duty police officer into the facility despite warnings from the staff. In August 2018, Father filed a motion to suspend or terminate Mother's visitation.

¶ 8 The trial court filed an *Order* on 28 May 2019 ("May 2019 Order"). The May 2019 Order decreed "[Father] shall have and exercise the sole legal and physical, custody, care and control of [Paula]"; "[Mother] shall not have any visitation with [Paula], but she shall be entitled to have phone call or Facetime video call contact with [Paula] one time per week each Saturday for 10 minutes [and] . . . a similar call for the same time on each Christmas, Thanksgiving, Easter and birthday of [Paula]." Mother timely appealed from the May 2019 Order.

ANALYSIS

¶ 9 The ultimate issue on appeal is whether the trial court erred in denying visitation between Mother and Paula. "It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody[,]" *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998), and therefore, "[w]e review an order denying visitation for

abuse of discretion." *In re J.R.S.*, 258 N.C. App. 612, 616, 813 S.E.2d 283, 286 (2018). The reason for an abuse of discretion standard of review is because the trial court "has the opportunity to see the parties in person and to hear the witnesses . . . . The trial court can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 527 (2016) (marks omitted). The trial court's decision will be "reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 10 Further, "[i]n a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Mitchell v. Mitchell*, 199 N.C. App. 392, 405, 681 S.E.2d 520, 529 (2009). "Unchallenged findings of fact are binding on appeal. Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*. If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Scoggin*, 250 N.C. App. at 118, 791 S.E.2d at 526 (marks omitted).

¶ 11 Mother's ultimate argument on appeal is "[t]he trial court erred in denying visitation between [Paula] and her mother." We disagree with Mother's contentions, especially in light of Finding of Fact 36.

A. Challenged Findings of Fact

¶ 12 On appeal, Mother challenges Findings of Fact 6, 15, 22, 23, 25, 27, 37, 38, and 39, as well as Conclusion of Law 4. Specifically, Mother contends Findings of Fact 23, 25, and 27 are not supported by the evidence in the Record. Mother also mentions Findings of Fact 15, 22, 37, and 38 in her brief, but does not argue these findings are unsupported by the evidence.

1. Findings of Fact Challenged as Unsupported by the Evidence

¶ 13 Finding of Fact 23 states:

> 23. Once [Paula] was safely returned to the care of [Father] in North Carolina, [Mother] did not initially exercise visits. Eventually, supervised visitation was set up through SonShine Child Care and Our House in Wilkesboro as described in the Temporary and Interim Orders in this cause. Visits at both locations became problematic due to [Mother's] behavior and

> complaints at each location. Neither facility will agree to supervise visits any longer in this case.

Mother only challenges the first sentence of Finding of Fact 23–"[o]nce [Paula] was safely returned to the care of [Father] in North Carolina, [Mother] did not initially exercise visits." Mother argues she "had no visitation rights to exercise until the entry of the trial court's [January 2017 Order] on 31 January 2017 as the trial court's [October 2016 Order] did not provide for any visitation rights."

¶ 14 The Record reflects Mother was first granted temporary supervised visitation in the January 2017 Order. Mother testified she began supervised visits at Our House in February 2017. The January 2017 Order was entered on 31 January 2017 and, while it is unclear when exactly in February the visits began, it is clear from the Record Mother initially exercised her visitation with Paula immediately. The challenged sentence of Finding of Fact 23 is unsupported by the evidence, and the trial court erred by making this finding. We strike the portion of Finding of Fact 23 that states: "Once [Paula] was safely returned to the care of [Father] in North Carolina, [Mother] did not initially exercise visits." *See State v. Messer*, 255 N.C. App. 812, 825, 806 S.E.2d 315, 324 (2017) ("This portion of the finding is not supported by substantial evidence. Accordingly, we strike this portion of the finding.").

¶ 15 However, striking this portion of Finding of Fact 23 does not affect the sufficiency of the remaining supported findings of fact to support the trial court's conclusion of law. Omitting this portion of the finding, the trial court's conclusion of law that "[i]t is not in [Paula's] best welfare and interests that [Mother] exercise any visitation" is still supported by the remaining abundant and detailed findings of fact, which are supported by substantial evidence as discussed in further detail below. *See In re E.M.*, 249 N.C. App. 44, 49, 790 S.E.2d 863, 869 (2016) ("[T]he inclusion of an erroneous finding of fact is not reversible error where the [trial] court's other factual findings support its determination.").

¶ 16 Finding of Fact 25 states, in pertinent part:

> 25. Likewise, Tracy Lowder, the Director of SonShine Child Care, also testified at [the] hearing. Mrs. Lowder indicated that although [Mother] was supplied with the Rules for the facility, [Mother] refused to sign them. Mrs. Lowder also testified that although [Mother] was appropriate for most visits, there were several times when [Mother] had to be cautioned regarding rule violations, including bringing other persons

> into the facility who were not supposed to be part of the visit, whispering to [Paula], taking photographs, and becoming belligerent with staff. *Eventually, visits at this location were also terminated due to [Mother's] behavior*.

(Emphasis added).[3] In challenging Finding of Fact 25, Mother argues visits at SonShine Child Care "stopped after [Mother] moved to North Carolina because the visits then became weekly and could all be accommodated by Our House."

¶ 17 Although visits may have stopped at SonShine Child Care because they became weekly and could all be accommodated by Our House, there is substantial evidence in the Record to support the finding that visits at SonShine Child Care were "*also* terminated due to [Mother's] behavior." (Emphasis added). Tracy Lowder, the Director of SonShine Child Care, testified as follows:

> [FATHER'S COUNSEL:] All right. So . . . is it the intention of SonShine [Child Care] to offer any further visitation --
>
> [LOWDER:] No.
>
> [FATHER'S COUNSEL:] -- at those premises?
>
> [LOWDER:] No, sir.
>
> [FATHER'S COUNSEL:] Okay. At least not to [Mother]?
>
> [LOWDER:] Right.
>
> [FATHER'S COUNSEL:] And you indicated several things. Was the fact that she let a visitor into the premises, is that a violation of your policy?
>
> [LOWDER:] Yes, it's a huge violation. She's let a visitor in before, but I was able to contain that visitor in a locked portion of the building. This visitor came into the supervised area portion of the building which is not allowed. I have no way of watching two people at the same time. I had to keep my back to this visitor, and I was very uncomfortable having her stand behind me the whole time.

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3. Mother only challenges the portion of Finding of Fact 25 that states: "Eventually, visits at this location were also terminated due to [Mother's] behavior."

> [FATHER'S COUNSEL:] In addition to that, what about the discussion and saying things like [Father] is a rapist, [Father is] a violent abuser, is [Mother] saying those sorts of things in front of [Paula]?
>
> [LOWDER:] Yes, she was saying those where [Paula] could hear what was being said.
>
> [FATHER'S COUNSEL:] Is that also a violation of your policies?
>
> [LOWDER:] It is.
>
> [FATHER'S COUNSEL:] *And for those reasons alone you would not allow her back*?
>
> [LOWDER:] *Exactly*. Some of the violations that she's had in the past like not volunteering her keys, the cell phone, those are minor and they're not going to harm [Paula]. But this attack on a parent, that is very psychologically harmful, and so that is something that we can't tolerate.
>
> [FATHER'S COUNSEL:] Were you concerned at any point that [Mother] was trying to flee the premises with [Paula]?
>
> [LOWDER:] Yes. By letting a visitor into the building, she had no idea that there is another person in the building that could assist me with the visitation until she arrived. So letting that other person in there was a huge violation and was definitely something that I was very concerned with. It would have been easy for the two of them to take [Paula] out of the premises if I had been by myself.

(Emphases added). This testimony explicitly states Mother was not allowed to continue visitation at SonShine Child Care because of her behavior and violations of the facility's rules. While the trial court's timeline implied by Finding of Fact 25 is incorrect, it does not impact the validity of the finding of fact that visits were ultimately terminated because of Mother's behavior.

¶ 18 To the extent that Finding of Fact 25 suggests the initial cessation of visitation at SonShine Child Care was due to Mother's behavior, the finding of fact is unsupported by evidence in the Record. However, there is substantial evidence in the Record to support the trial court's finding

that "*[e]ventually*, visits at [SonShine Child Care] were *also* terminated due to [Mother's] behavior." (Emphases added). Finding of Fact 25 is binding on appeal.

¶ 19 Finding of Fact 27 states:

> 27. Two local Wilkesboro police officers investigated the [31 July 2018] incident and allowed [Paula] to be released into the custody of [Father], despite the strong protests of [Mother], who made the statement: "*I am not leaving Wilkes County tonight without my child.*" [Mother] then insisted that Wilkes DSS be called, and the officers did so.

(Emphasis added). The 31 July 2018 incident referred to in Finding of Fact 27 is detailed in Findings of Fact 25 and 26:

> 25. . . . . The last visit at SonShine [Child Care] occurred on [31 July 2018]. Just prior to that visit, [Father] had gotten married and traveled with his new wife out of town on their honeymoon. [Mother] knew [Father] had left for his honeymoon . . . . Unbeknownst to SonShine [Child Care] staff, [Mother] had hired an off-duty, Hickory police officer . . . to show up toward the end of the visit on [31 July 2018]. Near the end of the visit, [Mother] saw a very small faint bruise on [Paula] . . . and insisted on lifting up [Paula's] shirt and taking a photograph. [Lowder] objected and told [Mother] that this was against the Rules of the facility. [Mother] persisted so much that [Paula] became very upset, "shut down," and started hiding under the table.
>
> 26. The circumstances of the [31 July 2018] visit was [sic] recorded by SonShine [Child Care] security cameras. . . . Toward the end of the visit, [Mother] began texting [the off-duty police officer] several times, urging her to come to the facility. [Mother] then exited the visitation room and began going to different doors in an effort to let [the off-duty police officer] into the facility, which was also against the rules. [Lowder] cautioned [Mother] several times to stop this behavior and to not let anyone in, but [Mother] ignored her and proceeded to let [the off-duty police officer] come in. [Paula] exited the visitation room, came into the hallway, and was near the side

> doorway when [Lowder] grabbed her hand and ushered her back into the room. [Lowder] was fearful that [Mother] was trying to remove [Paula] from the facility. At this point, [Lowder] felt that things were getting out of hand and contacted [Father's] family. [The off-duty police officer] had by that time called the local Wilkesboro police department. Authorities arrived, as did [Father] and his family. During this time, [Mother] was making negative comments about [Father] within the hearing of [Paula], which is also against SonShine [Child Care] rules. [Lowder] read her own Affidavit . . . into evidence at the hearing, and the [trial court] incorporates the same by reference into these findings of fact.

¶ 20 Mother argues there is no evidence that she made the statement "I am not leaving Wilkes County tonight without my child."

¶ 21 Mother testified to the following:

> [FATHER'S COUNSEL:] Well, you made the statement that night that, "I'm not leaving Wilkes County without my daughter"? You made that statement, didn't you?
>
> [MOTHER:] Sir, I have that recorded, and I did not make that statement at any point in time.

Father argues that because the trial court found Mother's testimony to be not credible, the trial court can draw the inference that Mother was lying when she testified that she did not make the statement, "I'm not leaving Wilkes County without my daughter." Father's argument does not correctly state the law.

¶ 22 "It is well settled that questions asked by an attorney are not evidence. Similarly, a question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind." *State v. Richardson*, 226 N.C. App. 292, 303, 741 S.E.2d 434, 442 (2013) (marks and citations omitted). As a result of the fact that Mother denied saying the statement "I'm not leaving Wilkes County without my daughter[,]" the Record contains no evidence that Mother made the statement "I am not leaving Wilkes County tonight without my child" from Finding of Fact 27.

¶ 23 The portion of Finding of Fact 27 that states Mother "made the statement: 'I am not leaving Wilkes County tonight without my child' " is not

supported by evidence in the Record. However, this portion of Finding of Fact 27 is not essential to the ultimate issue on appeal. *See In re A.Y.*, 225 N.C. App. 29, 41, 737 S.E.2d 160, 167 ("We agree that this [portion of the] finding of fact is [not] supported by competent evidence. . . . This error is, however, harmless."), *disc. rev. denied*, 367 N.C. 235, 748 S.E.2d 539 (2013).

2. Other Challenged Findings of Fact

¶ 24 Mother also challenges Findings of Fact 15, 22, 37, and 38, but does not argue these findings are unsupported by evidence in the Record. Rather, Mother appears to argue the trial court erred in using these findings to support its ultimate conclusion that "[i]t is not in [Paula's] best welfare and interests that [Mother] exercise any visitation." "A party abandons a factual [argument] when she fails to argue specifically in her brief that the contested finding of fact was unsupported by the evidence." *Peters*, 210 N.C. App. at 16, 707 S.E.2d at 735. Consequently, Findings of Fact 15, 22, 37, and 38 are binding on appeal. Nevertheless, we address each of these findings of fact, and Mother's corresponding argument in her brief, in sequential order and conclude they are supported by substantial evidence.

¶ 25 Finding of Fact 15 states:

> 15. [Mother] began making various statements to and in front of [Webb] which began to alarm [Webb]. For instance, [Mother] said several times, and in a serious manner, that she regretted not inviting [Father] to her house under the pretense of discussing custody, and then killing him and making it look like self-defense. [Mother] also admitted to [Webb] that she had a gun. [Mother] told [Webb] that she "understood how moms could kill their children." [Mother] confided to [Webb] that she was "desperate," and wanted to just drown in the river and die so that she would not have to deal with these problems. She described wanting to "float away with [Paula] to be with God." [Webb] interpreted these to be suicidal and homicidal ideations. [Webb] became increasingly alarmed about [Mother's] mental health.

¶ 26 Finding of Fact 22 states:

> 22. The [trial court] finds that at the time of [Paula's] recovery in Ohio, [Mother] was actively researching

> for ways to flee the United States by use of fake passports and ID's for herself and [Paula]. This is very troublesome for the [trial court] since [Mother] had already demonstrated a proclivity and ability to readily avoid court orders, arrest warrants, and hearings during the 5 ½ years that she had [Paula]. Coupled with the fact that [Mother] has contemplated killing [Father], has had access to a gun, and has had homicidal and suicidal thoughts regarding [Paula] and herself, the [trial court] believes [Mother] constitutes a significant on-going flight risk with [Paula], as well as a potential threat of harm to [Paula] and others.

¶ 27 In her brief, Mother addresses Findings of Fact 15 and 22 together:

> Presumably the comments to which the trial court refers [to in Finding of Fact 22] are the one[s] that [Mother] made in 2016 as referenced in [Finding of Fact] number 15. No doubt many divorced, or otherwise estranged parents, have voiced that they would like to kill the other parent of their children or that they wish they would die so they didn't have to deal with a problem. Adults often make such hyperbolic statements to one another. The ones in this case were made several years before the [May 2019 Order] was entered and are not indicative of any actual threat to [Paula].

Mother tries to minimize the impact of these statements on the welfare of Paula. However, both findings of fact are supported by testimony from Webb that Mother said to her "*several times*, *and in a serious manner*, that she regretted" not killing Father and making it look like self-defense. (Emphasis added). Webb testified to the following:

> [FATHER'S COUNSEL:] Would you please tell us about any observations by you that [Mother] in any manner threatened [Father's] life?
>
> [WEBB:] She expressed on more than one occasion that she regretted not inviting him to her home under the -- with him under the impression that they were going to discuss custody or him meeting [Paula]. And she would ask him to come into the house and provoke a fight and shoot him and kill him.

And she regretted not doing that. Because she felt like now she had to be on the run to avoid him and it would have been much simpler if she could have just killed him.

[FATHER'S COUNSEL:] Okay. So did she describe to you a very real and detailed plan to lure [Father] into her home so she could pretend that there was some type of attack and she would shoot him in self-defense?

[WEBB:] Yes.

[FATHER'S COUNSEL:] How many times during her nine-day stay with you did she mention that plan?

[WEBB:] Three or four.

[FATHER'S COUNSEL:] And how seriously did you take that threat?

[WEBB:] I could tell she was very serious when she said it. She said it very casually.

[FATHER'S COUNSEL:] Like she was unemotional?

[WEBB:] Yes.

[FATHER'S COUNSEL:] And what behaviors did you observe in [Mother] that made you believe [Mother] would follow through with a plan like that?

[WEBB:] During the time that she was at my house, she became increasingly more desperate. And I think that desperate people do desperate things. And she -- I very much believed her when she said she regretted not just what she called, "Doing it the easier way." Which was killing him.

[FATHER'S COUNSEL:] Okay. At this point, were you concerned about the state of [Mother's] mental health?

[WEBB:] Yes.

[FATHER'S COUNSEL:] And you specifically mentioned her shooting [Father]. Were you aware that [Mother] had ever owned a gun?

[WEBB:] Yes. She said that she had a gun in the house.

. . . .

[FATHER'S COUNSEL:] At some point during that nine-day stay with you, did [Mother] make a comment to you that she now understood how mothers can kill their children?

[WEBB:] Yes.

[FATHER'S COUNSEL:] When did she say that?

[WEBB:] It was probably the fifth or sixth day. It was more than halfway through her stay.

[FATHER'S COUNSEL:] And what prompted that statement?

[WEBB:] She was talking to [a friend] and I. [The friend] had come to my house to visit, and we were -- the kids were in bed and we were on the couch, just talking. And [Mother] was going through different possibilities, "Should I go to Japan? Should I go to Canada? Should I try to get a fake passport?" And every option she would say what complications there would be. "Well, I don't know how to get a fake passport." You know, "I'm going to Google how to do this." And, "I don't know how I would have money to go to Japan."

So every suggestion that -- that [Mother] came up with herself, there was a major problem with. And so she was just getting upset. . . .

. . . .

[FATHER'S COUNSEL:] At that point in time, were you fearful for the safety of [Paula]?

[WEBB:] Yes.

. . . .

[FATHER'S COUNSEL:] Did [Mother] make a comment to you that she wishes that she and [Paula] could just float away to be with God?

[WEBB:] Yes.

> [FATHER'S COUNSEL:] How many times did [Mother] say that to you?
>
> [WEBB:] Three or four times.
>
> [FATHER'S COUNSEL:] And what did that mean to you?
>
> [WEBB:] It mean [sic] that she wished they could drown in the river and die and not have to deal with the problems anymore is what she said. And I have a river in my backyard. So obviously that was a little specific for my comfort.

¶ 28 The trial court found in Finding of Fact 11 "the testimony of [Webb] [is] credible. [Webb] had no reason or motivation to lie or be deceptive with the [trial] court." Mother did not challenge this finding of fact and it is therefore binding. *See Scoggin*, 250 N.C. App. at 118, 791 S.E.2d at 526. Webb's testimony is substantial evidence in the Record to support Findings of Fact 15 and 22. These findings are binding on appeal.

¶ 29 Finding of Fact 37 states:

> 37. Due to [Mother's] behaviors, the [trial court] cannot allow unsupervised visitation with [Paula]. The [trial court] finds that if [Mother] has unsupervised visits with [Paula], she will likely flee again with [Paula]. She has shown by her past actions that she will not follow Court orders.

¶ 30 In her brief, Mother addresses Finding of Fact 37 by arguing:

> The trial court found that "if the mother has unsupervised visitation with [Paula], she will likely flee again with [Paula]." After [Paula] came into [Father's] custody, [Mother] moved to North Carolina. She began working fulltime as a First Steps Domestic Violence Case Manager in May 2017 and was still so employed at the time of the hearings at issue. She rented a home which was appropriate and adequately sized. The trial court found that [Mother] evaded service and disobeyed court orders in an attempt to keep [Father] out of [Paula's] life.
>
> Though [Mother] testified, to the contrary that to her knowledge, [Father] never sent any letters, holiday gifts, child support or otherwise showed that

> he wanted to have anything to do with [Paula], "it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). However, the trial court's concerns regarding the possibility that [Mother] would flee with [Paula] are adequately addressed by limiting visitation to supervised visitation within the home county. *See Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985)[.]

(Record citations omitted). Mother's argument suggests the trial court could have made a different finding in regard to unsupervised visitation and is asking this Court to reweigh the evidence in favor of Mother. However, this we cannot do, as our authority is limited to determining whether the "trial court's findings of fact are . . . supported by substantial evidence[.]" *Peters*, 210 N.C. App. at 12, 707 S.E.2d at 733. Findings of fact supported by substantial evidence are conclusive on appeal "even if there is sufficient evidence to support contrary findings." *Id.* at 12-13, 707 S.E.2d at 733. As Mother acknowledges, it is not for us to reweigh the evidence to determine what the trial court could have done.

¶ 31 There is substantial evidence in the Record to support Finding of Fact 37. As discussed above, there is credible testimony in the Record to support Finding of Fact 22, and that finding of fact is binding on us. Finding of Fact 22 states Mother's past and present actions, including her "proclivity and ability to readily avoid court orders," her research about fake passports, her access to a gun, and her mental health constitute an "on-going flight risk with [Paula], as well as a potential threat of harm to [Paula]." The trial court did not err in finding "the [trial court] cannot allow [Mother to exercise] unsupervised visitation with [Paula]" and "if [Mother] has unsupervised visits with [Paula], she will likely flee again with [Paula]." Finding of Fact 37 is binding on appeal.

¶ 32 Finding of Fact 38 states:

> 38. In a normal situation, the supervisor that [Mother] suggested would be appropriate. However, given [Mother's] actions at Our House and Son Shine Child Care, coupled with her past actions, lead the [trial court] to conclude that it would be impossible for her supervisor to be able to control her and prevent her from fleeing with [Paula].

¶ 33 In her brief, Mother quotes Finding of Fact 38 and argues:

> The supervisor suggested by [Mother] was someone [Mother] knew from church, Lydia. Lydia was a stay-at-home mother with four children, two of whom were adopted. There was no evidence indicating in any way that Lydia was under a disability or suffered from any other condition which would render her unable to alert the authorities if [Mother] tried to flee with [Paula].

(Citations omitted). Again, Mother's argument suggests we should reweigh the evidence in her favor. While the trial court could have pursued a different course of action with regard to who would supervise visitation, it chose not to do so, and we will not disturb that finding of fact as long as there is substantial evidence in the Record to support the finding.

¶ 34 Finding of Fact 38 is supported by substantial evidence in the Record, including unchallenged Findings of Fact 26 and 36. Finding of Fact 26 states:

> 26. . . . . Toward the end of the visit [at SonShine Child Care], [Mother] began texting [an off-duty police officer she hired] several times, urging her to come to the [SonShine Child Care] facility. [Mother] then exited the visitation room and began going to different doors in an effort to let [the off-duty police officer] into the facility, which was also against the rules. [Lowder] cautioned [Mother] several times to stop this behavior and to not let anyone in, but [Mother] ignored her and proceeded to let [the off-duty police officer] come in. [Paula] exited the visitation room, came into the hallway, and was near the side doorway when [Lowder] grabbed her hand and ushered her back into the room. [Lowder] was fearful that [Mother] was trying to remove [Paula] from the facility. At this point, [Lowder] felt that things were getting out of hand and contacted [Father's] family. [The off-duty police officer] had by that time called the local Wilkesboro police department. Authorities arrived, as did [Father] and his family. During this time, [Mother] was making negative comments about [Father] within the hearing of [Paula], which is also against SonShine [Child Care] rules. [Lowder] read

> her own Affidavit . . . into evidence at the hearing, and the [trial court] incorporates the same by reference into these findings of fact.

Finding of Fact 26 shows that Lowder, a neutral third-party, had a challenging time supervising Mother during her visits with Paula and feared Mother would flee with Paula. Based on this, there was substantial evidence to support the trial court's finding of fact that "it would be impossible for [Mother's] supervisor to be able to control her and prevent her from fleeing with [Paula]."

¶ 35 Finding of Fact 36 also supports Finding of Fact 38. In Finding of Fact 36, the trial court found "[Mother] will not follow the orders of [the trial court]." Even if the trial court were to allow Mother to choose the supervisor for her visits with Paula, this unchallenged finding of fact suggests Mother would not respect and obey the supervisor. There is substantial evidence in the Record to support Finding of Fact 38. This finding of fact is binding on appeal. We now address Mother's challenged conclusions of law.

B. Challenged Conclusions of Law

¶ 36 Mother challenges Findings of Fact 6 and 39 as at least partial conclusions of law. We agree that portions of Finding of Fact 6 and the entirety of Finding of Fact 39 are more properly labeled as conclusions of law.

> [T]he labels "findings of fact" and "conclusions of law" employed by the lower tribunal in a written order do not determine the nature of our standard of review. . . . [I]f the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that "finding" as a conclusion *de novo*.

In re V.M., 273 N.C. App. 294, 298, 848 S.E.2d 530, 534 (2020) (marks and citation omitted). "The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted).

¶ 37 Finding of Fact 6 states, in relevant part:

> 6. . . . . [Father] is a loving, fit and suitable custodian for [Paula], and it is in the best interests and welfare

> of [Paula] that she remain in the permanent, sole, legal and physical, care, custody and control of [Father]. *It is not in [Paula's] best welfare or interests that she have any visitation with [Mother]*.

(Emphasis added).

¶ 38 Finding of Fact 39 states:

> 39. Pursuant to [N.C.G.S. §] 50-13.5(i), the [trial court] finds that *it is not in the best interest of [Paula] to allow [Mother] visitation* because of the high probability that [Mother] will remove and secret [Paula] from the jurisdiction of the [trial court].

(Emphasis added).

¶ 39 Both Findings of Fact 6 and 39 conclude it is not in Paula's best welfare and interests that Mother exercise any visitation. In making this determination, the trial court applied legal analysis to the facts and concluded it is not in Paula's best interest to have visitation with Mother. This conclusion required the exercise of judgment and is more properly classified as a conclusion of law, rather than a finding of fact. *See In re J.R.S.*, 258 N.C. App. at 617, 813 S.E.2d at 286 (marks omitted) ("A determination regarding the best interest of a child is a conclusion of law because it requires the exercise of judgment."); *see also Huml v. Huml*, 264 N.C. App. 376, 400, 826 S.E.2d 532, 548 (2019). As Findings of Fact 6 and 39 are more properly classified as conclusions of law, we review them de novo to determine whether they are supported by the findings of fact.

¶ 40 Mother challenges Findings of Fact 6 and 39 and Conclusion of Law 4 as not being "adequately supported by the competent findings of fact." Similar to Findings of Fact 6 and 39, Conclusion of Law 4 states: "It is not in [Paula's] best welfare and interests that [Mother] exercise any visitation." As Findings of Fact 6 and 39 and Conclusion of Law 4 all make the same conclusion, that it is not in Paula's best interests for Mother to exercise visitation, we address them together.

¶ 41 "We review an order denying visitation for abuse of discretion." *In re J.R.S.*, 258 N.C. App. at 616, 813 S.E.2d at 286; *see Huml*, 264 N.C. App. at 389, 826 S.E.2d at 541-42 ("If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing cus-

tody agreement."). A trial court may deny visitation to a noncustodial parent if the parent is an unfit person to visit the child or it is in the best interests of the child to deny visitation. *See* N.C.G.S. § 50-13.5(i) (2019) ("[T]he trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.").

> Our courts have long recognized that sometimes, a custody order denying a parent all visitation . . . with a child may be in the child's best interest[.] . . . The welfare of a child is always to be treated as the paramount consideration. Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.

Huml, 264 N.C. App. at 399, 826 S.E.2d at 548; *see also In re Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 848-49 (1971) (emphasis omitted) ("The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the [trial] court is convinced such visitations are detrimental to the best interests of the child.").

¶ 42 The trial court's findings of fact support its conclusion in Findings of Fact 6 and 39 and Conclusion of Law 4 that "[i]t is not in [Paula's] best welfare and interests that [Mother] exercise any visitation." Findings of Fact 6 and 39 and Conclusion of Law 4 are supported by ample unchallenged findings of fact in the Record, including Findings of Fact 7, 9, 10, 11, 12, 13, 14, 16, 21, 33, 34, 34,[4] and 36. Those unchallenged findings of fact state:

> 7. [Father] first met [Paula] in September of 2016 at the Washington County Ohio CPS Office after [Paula] was recovered by authorities after 5 ½ years with [Mother]. [Father] and his family had searched for 5 ½ years for [Paula] . . . . Prior to September of 2016, [Mother] and her family had denied all contact of [Father] with [Paula] and had actually hidden and secreted [Paula] and [Mother] from [Father] with the logistical and financial aid of [Mother's] family. Pending release to the care of [Father] by Ohio CPS,

4. The May 2019 Order contains two findings of fact numbered "34."

[Paula] stayed in foster care for a period of time in Ohio while awaiting a decision by the courts. While [Paula] was in Ohio CPS custody, [Mother] stated in a phone call to [Father] on [25 September 2016] that she had received a spiritual epiphany and now suddenly wanted [Father] to be involved in [Paula's] life.

. . . .

9. At the time [Paula] came into the care of [Father], neither a birth certificate nor a social security number had ever been issued for [Paula], even though Indiana law required that a birth certificate be issued within 5 days. [Mother] intentionally refused to have this done for 5 ½ years. [Father] has now obtained both a delayed certificate of birth and social security number for [Paula].

10. Since living with [Father], [Paula] has exhibited no signs of multiple allergies nor needed any treatment for same, even though [Mother] insisted that [Paula] had numerous allergies of all types during the 5 ½ years that she was in [Mother's] care. [Paula's] counselor and doctor testified that these alleged "allergies" were another form of "control" exercised by [Mother] over [Paula]. During [these] 5 ½ years, [Mother] also refused to vaccinate [Paula], or get her dental care, or medical care of any kind. [Mother] only had [Paula] seen by chiropractors and "holistic" practitioners. Although the [trial] court realizes that parents have a right not to immunize their children, [Mother] gave conflicting testimony about why she refused to do so, first stating in her Interrogatory Answers that it was due to egg allergies, and then stating that it was due to her religious beliefs. [Mother] told Ohio DSS that [Paula] liked to eat eggs. She also told Ohio DSS that [Paula] had numerous food allergies and sensitivities but did not mention an egg allergy . . . . The [trial] court finds that [Mother's] beliefs that [Paula] had numerous allergies were completely unfounded, and that she actually endeavored to keep [Paula] from having medical records in order to help secret the child. Since acquiring custody,

[Father] has made sure that [Paula] has received all of her vaccinations, medical check-ups and treatment.

11. The [trial] court heard extensive testimony from [Father's] witness, [Webb], by video deposition. [Webb] is an acquaintance whom [Mother] met in college, but with whom she had no intervening contact for many years. In September of 2016, [Webb] was contacted by a mutual friend named Megan Buskirk, who said that [Mother] and [Paula] needed a place to stay in Ohio. [Mother's] mother, Karen Duncan, then drove [Mother] and [Paula] from Indiana to Ohio late at night on [12 September 2016]. They arrived at the Webb home under cover of darkness and drove straight inside a garage, so they would not be seen. [Karen Duncan] stayed overnight that night, too. This sudden trip to Ohio coincided with a recent "body attachment" and Order for Contempt which had just been issued by the courts in Indiana for [Mother] and [Paula] on [30 August 2016]. [Mother] and [Paula] remained at the Webb home for 9 days, from [12 September] through [21 September 2016]. During this time, [Webb] observed and communicated with [Mother] and [Paula] extensively. The [trial] court finds the testimony of [Webb] to be credible. [Webb] had no reason or motivation to lie or be deceptive with the [trial] court. She received no compensation or reward from [Father] or his family. If [Webb] had been testifying for money, then she would have given [Father] her information and location immediately when she first spoke with him. Instead, she waited and provided this information to [Father's] father.

12. [Mother] told [Webb] that she needed a place to stay because the [S]heriff in Hamilton County, Indiana came to her house looking for her and [Paula]. [Mother] also confided to [Webb] that she did not want to be found in Indiana. [Mother] told [Webb] that she wanted to keep [Paula] from [Father] because he and his family were "bad people." She regularly referred to them as "the crazies." Karen Duncan had said the same thing to [Webb] the night that Karen stayed at the Webb home. [Mother] told

[Webb] that she knew about court in Indiana and the "body attachment," but had no intention of going to Court. She also knew that [Father] and police were looking for her. [Mother] was tense and nervous during her stay at the Webb home. [Webb] did not know at first if what [Mother] was telling her about [Father's] family was true or not. The longer [Mother] stayed, the more [Webb] realized that [Mother] was lying and/or exaggerating. Although [Webb] did not want to be involved, she began to become seriously concerned for the welfare of [Paula] the more she heard from [Mother] and the more she learned on the internet about [Paula's] situation.

13. [Mother] had two cell phones while she was at the Webb home. [Mother] admitted that one of these phones was a "burner phone" which was not traceable. During her stay, [Mother] frequently talked to her lawyer, her mother, and her sister, Tiffany Duncan Midkiff, on these phones. [Mother] also admitted to [Webb] that she wanted to flee the country with [Paula] but could not afford to do so. [Mother] used the internet at [Webb's] home to actively research Japan and Canada and other countries which would not extradite her and [Paula]. [Mother] also researched fake passports for herself and [Paula] and discussed this five or more times with [Webb]. The [trial] court believes this testimony and does not find that [Webb] in any manner initiated or encouraged the idea of fleeing the country with [Paula].

14. During their nine day stay at the Webb home, [Mother] and [Paula] would not go outside much due to [Mother's] concern with being discovered. [Mother] admitted that when she did take [Paula] out in public she made [Paula] use false names like "Zoe" and "Eleanor."

. . . .

16. One afternoon [Webb] came home and found both [Mother] and [Paula] missing. When she searched and could not find them in the home, she walked down toward the river and found them walking back from

there. When [Webb] confronted [Mother], [Mother] acted guilty like she had been "caught." At this point, [Webb] decided that [Mother] may pose a real and serious threat to [Paula]. [Webb] then contacted both the Ohio and Indiana Sheriff's Departments multiple times. After getting no immediate response, she contacted [Father's] family. This ultimately led to the recovery of [Paula] shortly thereafter by Ohio authorities. Once [Paula] had been recovered, [Mother] made the statement to [Webb] that she would "like to kill whoever turned her in to DSS."

. . . .

21. [Mother] intentionally violated court orders and avoided arrest for 5 ½ years. She deliberately concealed [Paula] with the active aid and support of her family, including her mother and sister who lied to the Court in Indiana about the presence of [Mother] and [Paula]. [Mother] testified that both her mother, Karen Duncan, and her sister, Tiffany Midkiff, lied at a [30 May 2012], hearing in Indiana regarding the presence of both [Mother] and [Paula] at their Indiana home. Further, [Mother] admitted that numerous letters from [Father's] counsel . . . which had been sent to the Noblesville address and other addresses of [Mother] had all been rejected and "returned to sender." [Mother] stated that she was actually living at each address at the time, and that the writing on the letters to return them was her "mother's" handwriting. It is obvious to the [trial court] that [Mother] had to be aware of the Court proceeding in Indiana on [30 May 2012], since both her mother and sister showed up at that time and testified. [Mother] testified that her mother and sister did not tell her they went to the [30 May 2012] hearing until 2015. However, [the trial court] does not believe her. It is also obvious to the [trial court] that each time the authorities closed in on [Mother] and her family, that the family would simply move [Mother] and [Paula] to another location. In fact, for one 5-month period (from April of 2012 to August of 2012), Karen Duncan paid for [Mother] and [Paula] to live in extended stay

hotels in various areas of Indianapolis, Indiana, solely to avoid an outstanding body attachment and court proceedings in Indiana. Since [Mother] had no regular job or visible means of support, she was entirely dependent upon her family for the support of herself and [Paula] during this time. It is also obvious that [Mother] was in regular contact with her family during this entire time since she required their regular aid and assistance.

. . . .

33. Both [Paula's doctor,] Dr. Wilson[,] and [Paula's counselor,] Counselor Griffin[,] further opined that such deceptive behavior by [Mother] was actually a mechanism of control over [Paula], as was [Mother's] breast feeding of [Paula] until a late age, the self-diagnosis of numerous false allergies, the refusal to immunize her, the refusal to allow her to attend school, the refusal to obtain a birth certificate or social security number, and the refusal to let her use her real name in public. Not only did these things all exhibit control, but they also demonstrated in Dr. Wilson's words, a disturbing level of "paranoia" and "narcissism" by [Mother]. Dr. Wilson was particularly concerned from a medical standpoint that [Mother] had withheld all medical care and immunizations from [Paula] for no justifiable reason for 5 ½ years. [Paula] had even been born at home with no prenatal care from any medical doctor. Dr. Wilson opined that this was all unnecessary, dangerous behavior in regard to [Paula]. . . . .

34. It is obvious to the [trial court] that [Mother's] plan to conceal [Paula] from [Father] for 5 ½ years included the taking of unwarranted and even life-threatening health risks for [Paula]. It is equally obvious to the [trial court] that [Mother] is still in denial about her responsibility for hiding and concealing [Paula] from [Father] for 5 ½ years. . . . .

34. The [trial court] further believes that [Paula] would benefit from some additional counseling to deal with the anger issues which she has experienced

> . . . . Any counselor selected by [Father] for such purpose should be provided copies of all testing, notes, reports and other information which is produced by [Mother's] psychiatrist. The counselor is not required to do so but may also do counseling sessions with [Mother] if and when it is deemed necessary or advisable by the counselor.
>
> . . . .
>
> 36. [Mother's] continued violations of rules of the supervising agencies, Our House and SonShine Child Care, *shows the [trial court] that she will not follow the orders of [the trial court]*.

(Emphasis added).

¶ 43 "[I]t is well established by this Court that where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Cushman v. Cushman*, 244 N.C. App. 555, 558, 781 S.E.2d 499, 502 (2016). Mother has not challenged any of the above-mentioned findings of fact, and they are therefore binding on us.

¶ 44 These unchallenged findings of fact and the challenged findings of fact supported by substantial evidence demonstrate Mother's behaviors have been more harmful than beneficial to Paula and many of Mother's actions will have life-long mental, physical, and emotional consequences for Paula. Further, Mother remains a flight risk and refuses to comply with the rules of the visitation agencies. Most importantly, Mother has shown and the trial court explicitly found, in Finding of Fact 36, that *she will not follow court orders*. We emphasize the importance of this unchallenged and binding finding regarding a party's unwillingness to comply with court orders.

¶ 45 While Mother argues "the trial court's concerns regarding the possibility that [Mother] would flee with [Paula] are adequately addressed by limiting visitation to supervised visitation within the home county[,]" she fails to acknowledge the fact that Mother continues to disobey the rules of the supervising agencies and has continually caused disruptions during visitations with Paula. Moreover, unchallenged Finding of Fact 30 states, in part, "[Mother's] actions suggest to the [trial court] that she was attempting to get the police or DSS to place [Paula] in her custody that day on [31 July 2018]" when Mother brought an off-duty police officer to the visitation center and caused a disruption. Mother has also

historically disobeyed and circumvented orders of the courts. The trial court's determination that limiting visitation to supervised visitation within the home county was not feasible is supported by the Record.

¶ 46 Considering the evidence and findings that Mother has already demonstrated a proclivity and ability to readily avoid court orders, arrest warrants, and hearings during the five-and-a-half years she had Paula in her custody, has contemplated killing Father, has had access to a gun, and has had homicidal and suicidal thoughts regarding Paula and herself, Findings of Fact 6 and 39 and Conclusion of Law 4 are supported by the findings of fact in the Record. "It is not in [Paula's] best welfare and interests that [Mother] exercise any visitation."

CONCLUSION

¶ 47 The trial court did not err when it denied visitation between Paula and Mother. Substantial evidence and unchallenged findings of fact support the findings of fact challenged by Mother, and the findings of fact support the trial court's conclusion of law that it is not in Paula's best interest to have visitation with Mother.

AFFIRMED.

Judges INMAN and WOOD concur.

LAUREN OSBORNE, BY AND THROUGH HER GUARDIAN, MICHELLE ANN POWELL AND MICHELLE ANN POWELL, PLAINTIFFS

v.

YADKIN VALLEY ECONOMIC DEVELOPMENT DISTRICT, INCORPORATED; STOKES COUNTY BOARD OF EDUCATION; STOKES COUNTY SCHOOLS; SONYA M. COX; PATRICIA M. MESSICK; REBECCA BOLES; WILLIAM HART; JAMIE YONTZ; BRAD LANKFORD; RONNIE MENDENHALL; JEFF COCKERHAM; DEFENDANTS

No. COA20-485

Filed 7 September 2021

1. Civil Rights—42 U.S.C. § 1983—equal protection—sexual assault of student by bus driver—sufficiency of allegations

Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their equal protection claim (pursuant to 42 U.S.C. § 1983) against the school board where there were no factual allegations

that the student was treated differently on the basis of her gender and where the student's disability did not afford her special protection under the Equal Protection Clause.

2. Civil Rights—42 U.S.C. § 1983—substantive due process—sexual assault of student by bus driver—sufficiency of allegations

Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their substantive due process claim (pursuant to 42 U.S.C. § 1983) that the school board deprived the student of bodily integrity where there were no factual allegations that the board intentionally acted to increase the risk of danger to the student.

3. Civil Rights—42 U.S.C. § 1983—sexual assault of student by bus driver—failure to train and supervise

Parents of a special-needs student who was sexually assaulted by her bus driver—a person who worked for the independent contractor hired by the school board—did not plead sufficient facts to support their equal protection claim (pursuant to 42 U.S.C. § 1983) that the school board failed to properly train and supervise the bus driver who committed the assaults. There were no factual allegations that there were similar prior incidents, that the board showed a deliberate indifference that led to the assaults, or that the board had actual or constructive knowledge that the bus driver posed a risk to the student.

4. Negligence—duty of care—transport of special-needs student—statutory authority to delegate—independent contractor rule

A school board was not liable for the actions of a bus driver who sexually assaulted a special-needs student where the board properly delegated its duty to safely transport the student pursuant to N.C.G.S. § 115C-253 to a non-profit transportation service, which operated as an independent contractor because the Board did not retain the right to exercise control over its performance of the contract.

5. Civil Rights—Title IX claim—sexual assault of female student by bus driver—no actual knowledge by school board

There was no genuine issue of material fact regarding the Title IX discrimination claim brought against a school board by the parents of a special-needs student who was sexually assaulted by her bus driver—who worked for the independent contractor hired by the

school board—where no school board member or school employee had any actual knowledge that the student had been assaulted until after the bus driver was arrested and fired.

Judge DIETZ concurring by separate opinion.

Judge ARROWOOD concurring by separate opinion.

Appeal by Plaintiffs from orders entered 26 August 2019 by Judge Stanley L. Allen and 18 February 2020 by Judge Eric C. Morgan in Stokes County Superior Court. Heard in the Court of Appeals 26 January 2021.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by W. Kirk Sanders and Joshua P. Dearman, for Plaintiffs-Appellants.

Tharrington Smith, LLP, by Deborah R. Stagner, for Stokes County Board of Education, Defendant-Appellee.

WOOD, Judge.

¶ 1 Lauren Osborne ("Lauren") and Michelle Ann Powell ("Ms. Powell"), Lauren's mother, (collectively, "Plaintiffs") appeal from an order granting summary judgment regarding Plaintiffs' negligence claim and Title IX of the Education Amendments of 1972 ("Title IX") claim in favor of the Stokes County Board of Education (the "Board"), and an order dismissing Plaintiffs' claims under 42 U.S.C. § 1983 *et seq.* ("Section 1983"). After careful review of the record and applicable law, we affirm the order of the trial court.

I. Background

¶ 2 Lauren was a twenty-year-old special-needs student who attended West Stokes High School. Lauren is severely disabled with an IQ of forty-one and the functional capacity of a first-grade student. Testimony from Lauren's teacher, nurse, assistant, principal, yellow bus driver, and the superintendent demonstrates Lauren was vulnerable, immature, and susceptible to exploitation. In addition to her mental disability, Lauren suffers from severe diabetes. Her condition requires her to have an insulin pump, emergency medical plan, and monitoring by adults throughout the day as she has needed transportation to the hospital for medical care on several occasions. Lauren also required constant adult supervision at school to prevent bullying by other students.

¶ 3 Every special-needs student has their own Individualized Education Plan ("IEP") prepared by an IEP team that outlines that student's learning plan. Jane Wettach, *Parents' Guide to Special Education in North Carolina* 12 (2017). https://law.duke.edu/childedlaw/docs/Parents%27_guide.pdf. The Board oversees and administers public schools in Stokes County, North Carolina. Entities, like the Board, are required to give parents advance notice of a student's annual IEP development meeting. The Board is also required to encourage parents to participate in the development of their student's learning plans. Throughout her enrollment in Stokes County Schools ("SCS"), Lauren had an IEP, and she received transportation to her assigned school as a "related service" to her IEP, under the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Prior to November 2013, Lauren rode to West Stokes High School on a yellow school bus owned by SCS. Lauren's bus exclusively transported special-needs students and had an assigned bus monitor[1] because other students on the bus required a monitor as part of their IEPs. This bus was known as an exceptional children's ("EC") bus.

¶ 4 In 2013, many special-needs students in Stokes County were assigned to specialized classes offered at schools other than their districted schools, and their bus rides could be exceptionally long. To address the long bus rides for students and to promote the efficiency of its bus fleet, SCS Transportation Director Brad Lankford ("Mr. Lankford") recommended that the Board explore using contracted transportation for exceptional students. Mr. Lankford investigated the cost of contracting transportation services. In August 2013, the Board contracted with Yadkin Valley Economic Development District, Inc. ("YVEDDI") to provide transportation for some of the special-needs students enrolled in SCS.

¶ 5 YVEDDI is a non-profit corporation that has provided transportation services for several neighboring school districts for decades. YVEDDI also provides transportation services for Head Start[2] and sheltered workshop programs for adults with disabilities. Before recommending that YVEDDI provide transportation services for SCS students, Mr. Lankford talked to transportation directors in surrounding counties to get references and an idea of the cost and type of services

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1. A bus monitor rides a school bus on assigned route(s) and schedule(s) to provide safe and efficient transportation so that a student may enjoy the fullest possible advantage from the programs and offerings of the school system. We use "bus monitor" and "safety monitor" interchangeably throughout.

2. Head Start is a federally funded, comprehensive program designed to promote the readiness of infants, toddlers, and preschool-aged children from low-income families through a variety of special services.

YVEDDI provided. Mr. Lankford also requested qualification and safety information from YVEDDI's transportation director, Jeff Cockerham ("Mr. Cockerham"). YVEDDI had a safety plan in place which included driver hiring procedures and qualifications, drug testing, vehicle maintenance, and security. Before the Board entered into its initial contract with YVEDDI, Mr. Cockerham provided to Mr. Lankford the following: YVEDDI's safety plan; minimum qualifications for YVEDDI drivers; training program for YVEDDI drivers; YVEDDI's drug and alcohol compliance documentation; preventative maintenance schedule; and certificate of liability insurance. YVEDDI offered to quote its bid with safety monitors on board the vehicles, but the Board declined to have YVEDDI include safety monitors in the bid. The State does not reimburse school systems for safety monitors.

¶ 6 The Board's contract with YVEDDI required the transportation company to comply with its approved safety plan, provide a well-trained driver, conduct pre-employment criminal background checks and drug testing of drivers, and to conduct random drug testing according to North Carolina Department of Transportation ("NCDOT") regulations. YVEDDI began transporting some SCS special-needs students to and from school in August 2013, at the start of the 2013-2014 school year. The Board entered into subsequent contracts with YVEDDI to transport special-needs students to and from school in the 2014-2015 and 2015-2016 school years. The YVEDDI vans that transported SCS students were equipped with safety equipment including first aid kits, NCDOT-mandated video cameras, and "push to talk phones."

¶ 7 Lauren was accustomed to riding a yellow school bus with other special-needs students and a safety monitor for transportation to West Stokes High School. Starting in November 2013, the Board changed Lauren's transportation from an exceptional students school bus with a safety monitor to a YVEDDI van that did not have a safety monitor. The school notified Lauren's mother of the change to Lauren's transportation service only after the arrangements were made. According to Mr. Lankford's deposition testimony, Lauren's change from an exceptional students school bus with a safety monitor to a YVEDDI van without one required an IEP team meeting. Additionally, Lauren's teacher testified that transportation was not discussed in Lauren's annual IEP meeting, and furthermore, had it been discussed during the meeting, he would have recommended a safety monitor for his special-needs students like Lauren.

¶ 8 During the 2014-2015 and 2015-2016 school years, Lauren was transported in a YVEDDI van driven by Robert King ("King"), a YVEDDI employee. King held a valid North Carolina driver's license that met

YVEDDI's license requirements. King completed YVEDDI's application, screening, and driver training required under YVEDDI's safety plan. King had no prior criminal record and received both pre-employment and quarterly criminal background checks. King was drug tested and received forty hours of classroom and on-the-job driver training that met NCDOT standards. King was trained on interacting with disabled passengers; sensitivity and sexual harassment; defensive driving; bloodborne pathogens; and first aid and CPR. King was also informed he was not supposed to touch the students he was transporting.

¶ 9 On two separate days in December 2015, while transporting Lauren and other students, King stopped the YVEDDI van multiple times and sexually assaulted Lauren. The YVEDDI van was equipped with video cameras, and video evidence reveals King sexually assaulted Lauren twenty-one times by groping and digitally penetrating her. Though Lauren was twenty years old, she only had the functional capacity of a first-grade student and lacked the capability to comprehend and consent to the sexual acts committed against her. Specifically, Lauren lacked the communication skills to tell Ms. Powell why she suffered from anal bleeding resulting from the sexual assaults.

¶ 10 A Stokes County resident was concerned about the operation of the van and reported King's driving to YVEDDI, which prompted the company to review the video footage on Lauren's van. YVEDDI discovered King's inappropriate actions against Lauren and immediately reported King's actions to law enforcement and terminated his contract. YVEDDI did not notify the Board of the assaults, King's arrest, or King's termination. School officials first learned about the sexual assaults from Lauren's mother, Ms. Powell, after she was contacted by law enforcement following King's arrest. When the Board's superintendent, assistant superintendent, Exceptional Childrens director, transportation director, and the West Stokes High School principal all learned of the sexual assaults, they did not investigate for other potential sexual assaults against students, draft a report on Lauren's sexual abuse, or offer post-abuse counseling. The Board's policies require all verified sexual assault cases to be investigated and reported to the State Board of Education. The Board also requires written documentation of all reports of sexual assaults and requires the school system's responses to be maintained. The Board did not report Lauren's sexual assaults to the State Board of Education as required by its standard procedure, nor did it offer an explanation as to why it did not follow its standard procedure.

¶ 11 On December 4, 2018, Plaintiffs filed a complaint against the Board, the Board's individual school board members and staff, YVEDDI, Mr.

Cockerham, and SCS. Plaintiffs asserted claims for negligence; negligence *per se*; negligent infliction of emotional distress; Section 1983 discrimination; Title IX damages; and negligent supervision, retention, and common carrier stemming from the multiple sexual assaults by the van driver.

¶ 12 On March 6, 2019, the Board filed its answer and motion to dismiss Plaintiffs' Section 1983 and Title IX claims. On August 26, 2019, the trial court granted the Board's motion in part, dismissing all of Plaintiffs' Section 1983 claims and Plaintiffs' Title IX claims with respect to the individual school board members and staff. The Title IX claims against the Board, however, remained intact. On August 22, 2019, Plaintiffs voluntarily dismissed their claims against YVEDDI and Mr. Cockerham.

¶ 13 On November 13, 2019, Plaintiffs moved for partial summary judgment on liability and causation of damages regarding Plaintiffs' negligence *per se* claim. The Board moved for summary judgment as to Plaintiffs' remaining Title IX; negligence; negligence *per se*; and negligent supervision, retention and common carrier claims on November 14, 2019. On February 18, 2020, the trial court denied Plaintiffs' motion for partial summary judgment and granted the Board's motion for summary judgment on Plaintiffs' negligence *per se*; negligence; negligent infliction of emotional distress; Title IX; and negligent hiring, training, retention, and supervision claims. On March 2, 2020, Plaintiffs filed a notice of appeal.

II. Discussion

¶ 14 Plaintiffs raise several arguments on appeal. Each will be addressed in turn.

A. The Board's Motion to Dismiss

¶ 15 Plaintiffs contend the trial court erred in granting the Board's motion to dismiss Plaintiffs' claims under Section 1983. Plaintiffs' claims arise from alleged violations of Lauren's constitutional rights to equal protection and substantive due process. Plaintiffs asserted an additional Section 1983 claim alleging failure to train and supervise. Specifically, Plaintiffs argue the trial court erred in dismissing their Section 1983 claims because their complaint "stated sufficient factual allegations" to state a claim pursuant to N.C. R. Civ. P. 12(b)(6). We disagree.

¶ 16 In reviewing an order granting a motion to dismiss, "we review the pleadings *de novo* to determine their legal sufficiency and . . . whether the trial court's ruling was proper." *Radcliffe v. Avenel Homeowners Ass'n, Inc.*, 248 N.C. App. 541, 552, 789 S.E.2d 893, 902 (2016) (citation

omitted). "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). "North Carolina is a notice pleading state." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation omitted). "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)." *Raritan River Steel Co.*, 322 N.C. at 205, 367 S.E.2d at 612.

¶ 17 "When the complaint on its face reveals the absence of fact sufficient to make a good claim, dismissal of the claim pursuant to Rule 12(b)(6) is properly granted." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 57, 554 S.E.2d 840, 845 (2001) (internal quotations marks, citation, and alterations omitted). "On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014) (citation omitted). Dismissal is appropriate when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

1. Equal Protection

¶ 18 **[1]** Plaintiffs allege the Board violated Lauren's constitutional right to equal protection. The Equal Protection Clause of the Fourteenth Amendment (the "Equal Protection Clause") to the United States Constitution (the "Constitution") provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To state an equal protection claim, a plaintiff must plead sufficient facts to "demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Williams v. Hansen*, 326 F.3d 569, 576 (4th Cir. 2003) (citation and quotation marks omitted), *cert. denied*, 540 U.S. 1089, 124 S. Ct. 958, 157 L. Ed. 2d 794 (2003); *see also Gilreath v. Cumberland Cnty. Bd. of Educ.*, No. COA16-927, 2017 N.C. App. LEXIS 307, at *16-17 (N.C. Ct. App. April 18, 2017). The second element of an equal protection claim requires factual allegations sufficient to show that any unequal treatment was done intentionally or purposefully to discriminate against the plaintiff. *Good Hope Hosp., Inc. v. N.C. Dept. of Health and Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005)).

¶ 19 Here, the complaint alleges that "Lauren, as a female, is a member of a protected class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." However, because the complaint is devoid of any factual allegations sufficient to establish that Lauren was treated differently from similarly situated male students, it fails to state the first element of an equal protection violation based on Lauren's gender. *See Hanton v. Gilbert*, 842 F. Supp. 845, 854 (M.D.N.C.), *aff'd*, 36 F.3d 4 (4th Cir. 1994) ("Plaintiff must show that she was treated differently from other similarly situated individuals and that but for her sex she would not have been so treated."); *see also Gilreath*, 2017 N.C. App. LEXIS 307, at *16-17.

¶ 20 Plaintiffs also allege in the complaint that Lauren was denied equal protection on the basis of her disability, because she was isolated and segregated from the general student population in transportation. However, the Supreme Court has held that the disabled are not a suspect or quasi-suspect class entitled to special protection under the Equal Protection Clause. *See Brown v. N.C. Dep't of Motor Vehicles*, 166 F.3d 698, 706 (4th Cir. 1999); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46, 105 S. Ct. 3249, 3257-58, 87 L. Ed. 2d 313, 324 (1985).

¶ 21 Therefore, we conclude Plaintiffs' claim under Section 1983 for violation of the Equal Protection Clause was properly dismissed under Rule 12(b)(6).

2. Substantive Due Process

¶ 22 **[2]** Plaintiffs also allege the Board deprived Lauren of her right to substantive due process. "Section 1983 imposes liability on state actors who cause the deprivation of any rights, privileges, or immunities secured by the Constitution. Under established precedent, these constitutional rights include a Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity." *Doe v. Durham Pub. Sch. Bd. of Educ.*, No. 1:17-CV-773, 2019 WL 331143, at *8 (M.D.N.C. Jan. 25, 2019); *see also Farrell v. Transylvania Cnty. Bd. of Educ.*, 199 N.C. App. 173, 180, 682 S.E.2d 224, 230 (2009) (recognizing the "right to ultimate bodily security . . . is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process" (citation omitted)). Sexual molestation of a student by a state actor may be a constitutional injury for purposes of Section 1983. *Durham Pub. Sch. Bd. of Educ.*, 2019 WL 331143 at * 8 (citations omitted). However, "a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Stevenson ex*

rel. Stevenson v. Martin Cnty. Bd. of Educ., 3 Fed. App'x 25, 32 (4th Cir. 2001) (citing *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198, 109 S. Ct. 998, 1004, 103 L. Ed. 2d 249, 260 (1989)).

¶ 23 Here, Plaintiffs allege the Board "created a dangerous environment for Lauren" by contracting with YVEDDI to transport disabled students, failing to require YVEDDI to have a monitor on the bus, and by not verifying that YVEDDI was monitoring the video camera. However, "to establish [Section] 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through *affirmative acts*, not merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015) (emphasis added); *see also DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006, 103 L. Ed. 2d at 262-63 (observing that "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them . . . . Under th[o]se circumstances, the State had no constitutional duty to protect [the child.]"). Plaintiffs' complaint does not contain factual allegations that would establish conduct by the Board that was so intentional or affirmative that it shocks the conscience.

¶ 24 Thus, we conclude Plaintiffs' claim under Section 1983 for violation of substantive due process was properly dismissed under Rule 12(b)(6).

3. Failure to Train and Supervise

¶ 25 **[3]** Plaintiffs also allege the Board failed to properly train and supervise its employees, including YVEDDI and King, which led to violations of Lauren's constitutional rights to equal protection. As a preliminary matter, we note our courts have not yet decided a failure to train claim arising under Section 1983. Therefore, we look to decisions of federal jurisdictions for persuasive guidance.

> A municipality's failure to train its officials can result in liability under [S]ection 1983 only when such failure reflects a deliberate indifference to the rights of its citizens and the identified deficiency in a city's training program [is] closely related to the ultimate injury. Additionally, a plaintiff must show a direct causal link between a specific deficiency in training and the particular violation alleged.

Hill v. Robeson Cnty., N.C., 733 F. Supp. 2d 676, 686-87 (E.D.N.C. 2010) (internal citations and quotation marks omitted). However, "[a]

municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417, 426-27 (2011). "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. . . . A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 61-62 (internal quotation marks omitted). The deficiency in training must also "make the occurrence of the specific violation a 'reasonable probability rather than a mere possibility.' " *Hatley v. Bowden*, No. 5:13-CV-765-FL, 2014 WL 860538, at *3-4 (E.D.N.C. Mar. 5, 2014) (quoting *Semple v. City of Moundsville*, 195 F.3d 708, 713 (4th Cir. 1999)).

¶ 26 Here, Plaintiffs fail to allege sufficient factual allegations to support a liability claim under Section 1983 for failure to train the Board, school officials, YVEDDI, and King. Plaintiffs do not allege there were prior incidents of this kind, nor are there any factual allegations showing that the Board or school officials demonstrated a deliberate indifference that was likely to lead to a contracted bus driver's sexual abuse of a student. The failure to train municipal personnel may rise to the level of an unconstitutional custom or policy, where there is a history of widespread abuse. *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412, 426-27 (1989); *see also Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983). Plaintiffs further fail to identify any specific deficiency in training that led to a violation of Lauren's constitutional rights. Instead, the complaint contains general contentions that the Board failed to provide training or supervision regarding the duty to "[m]onitor, perceive, and stop sexual assault and abuse." However, allegations of mere negligence with regard to training are insufficient to state a claim for municipal liability. *See Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987)); *see also City of Canton*, 489 U.S. at 389, 109 S. Ct. at 1205, 103 L. Ed. 2d at 427 (finding that mere allegations regarding a city policy or custom cannot confer municipal liability for failure to train (citations omitted)).

¶ 27 Plaintiffs also asserted Section 1983 liability based on a failure to supervise.

> [T]o establish supervisory liability under [Section] 1983[, a plaintiff must show]: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury

> to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,'; and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

See Farrell, 199 N.C. App. at 181, 682 S.E.2d at 230 (quoting *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.), *cert. denied*, 513 U.S. 813, 115 S. Ct. 67, 130 L. Ed. 2d 24 (1994)). Likewise, "a supervisor's failure to train his employees can subject him to liability where the failure to train reflects a 'deliberate indifference' to the rights of citizens." *Durham Cnty. Bd. of Educ.*, 2019 WL 331143, at *8 (quoting *Layman v. Alexander*, 294 F. Supp. 2d 784, 793 (W.D.N.C. 2003)); *see also City of Canton*, 489 U.S. at 389, 109 S. Ct. at 1204, 103 L. Ed. 2d at 429 (holding that respondent's civil rights claim was cognizable only if petitioner's failure to train its police force "reflect[ed] a deliberate indifference to the constitutional rights of its inhabitants").

¶ 28 Here, King is the only individual Plaintiffs allege to have abused Lauren. King was not a subordinate of the Board. No school employee is alleged to have committed acts upon Lauren that violated her substantive due process rights to bodily integrity and to be free from sexual abuse. Thus, a claim that the Board failed to properly train or supervise its employees or subordinates fails.

¶ 29 Plaintiffs do not allege facts of supervisory liability sufficient to survive a motion to dismiss. All factual allegations in the complaint regarding the Board's alleged supervisory liability consist of contentions that it failed to ensure YVEDDI properly trained and supervised its employees. Such allegations simply do not support a plausible conclusion that the Board had actual or constructive knowledge that King was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to Lauren. Therefore, the trial court properly dismissed Plaintiffs' Section 1983 claims against the Board for failure to train and supervise.

B. The Board's Motion for Summary Judgment

¶ 30 Next, Plaintiffs allege the trial court erred in granting Defendant's motion for summary judgment with respect to Plaintiffs' negligence and Title IX claims.

¶ 31 This Court reviews an appeal from a summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

"Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

¶ 32 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. 1A-1, Rule 56(c) (2020). "If a genuine issue of material fact exists, a motion for summary judgment should be denied." *Park East Sales, LLC v. Clark-Langley, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004)).

¶ 33 To survive a motion for summary judgment in a negligence case, the plaintiff must establish a *prima facie* case of negligence. Specifically, Plaintiffs must show "(1) [the Board] owed the plaintiff a duty of reasonable care, (2) [the Board] breached that duty, (3) [the Board's] breach was an actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages as the result of [the Board's] breach." *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009) (quoting *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994) (citations omitted)). "[T]he question of foreseeability is one for the jury." *Carsonaro v. Colvin*, 215 N.C. App. 455, 459, 716 S.E.2d 40, 45 (2011) (quoting *Fussell v. NC Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010)). Summary judgment is rarely granted in negligence cases. *King v. Allred*, 309 N.C. 113, 115, 305 S.E.2d 554, 556 (1983).

¶ 34 "The party moving for summary judgment has the burden of establishing the lack of any triable issue," and "[a]ll inferences of fact from the proofs offered at the hearing must be drawn . . . in favor of the party opposing the motion." *Monzingo v. Pitt County Memorial Hosp. Inc.*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992) (citations omitted). The Board has the burden to prove Plaintiffs failed to demonstrate the essential elements of negligence. *See id.* (citations omitted).

1. The Board's Negligence

¶ 35 **[4]** Plaintiffs contend the trial court erred in granting the Board's motion for summary judgment with respect to Plaintiffs' negligence claim. Plaintiffs argue genuine issues of material fact exist regarding (1) the duty of care the Board owed to Lauren and (2) the foreseeability of the harm Lauren suffered. While we sympathize with Plaintiffs for the

irreparable harm Lauren suffered, we must find the trial court properly granted summary judgment under our current tort law.

¶ 36 First, the parties dispute whether the Board should be held to a heightened standard of care when making transportation decisions for special-needs students. Plaintiffs contend the Board had a heightened duty of care to ensure Lauren's safety from the dangerous actions of others because she was a member of a vulnerable population. In cases where the student in question is a member of a vulnerable population, particularly one who possesses an IQ far below the average for her age, we reiterate that the State owes a duty of care "relative to the [victim]'s maturity." *Nowlin v. Moravian Church in Am.*, 228 N.C. App. 307, 311, 745 S.E.2d 51, 54 (2013). In *Nowlin*, this Court held "foreseeability of harm to the [victim] is the relevant test which defines the extent of the duty to safeguard [victims] from the dangerous acts of others." *Nowlin*, 228 N.C. App. at 311, 745 S.E.2d at 54. Under a pure "foreseeability of harm test," we recognize a jury could reasonably conclude the Board owed students such as Lauren a heightened duty of care. *See id.*; *see also Carsonaro*, 215 N.C. App. at 459, 716 S.E.2d at 45 (citing *Fussell*, 364 N.C. at 226, 695 S.E.2d at 440) (holding foreseeability is generally a question to be decided by the jury). While we agree with Plaintiffs that the Board was required to exercise a heightened duty of care while making decisions regarding its special needs pupils, we find the trial court properly granted summary judgment under our current tort law.

¶ 37 Plaintiffs rely on *Slade v. New Hanover Cnty. Bd. of Educ.*, 10 N.C. App. 287, 291, 178 S.E.2d 316, 318 (1971), in which this Court recognized that certain school employees, such as a bus driver, have a duty to exercise a high degree of caution in fulfilling their employment obligations. 10 N.C. App. at 291, 178 S.E.2d at 318 (citing *Greene v. Board of Education*, 237 N.C. 336, 340, 75 S.E.2d 129, 131 (1953)). This Court noted that a bus driver is responsible for the safety of children of different ages and levels of maturity so that "it is his duty to see that those who do alight [from the bus] are in places of safety" and looked after with care "proportionate to the degree of danger inherent in the passenger's youth and inexperience." *Id.* at 291, 295, 178 S.E.2d at 318, 321. We emphasize the standard recognized in *Slade* and reiterate that certain school employees have a duty to exercise a high degree of caution in fulfilling their responsibilities. However, a fundamental principle of our current tort law defeats Plaintiffs' claim in this case. Generally, "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991). The only exception to this rule

is certain non-delegable duties, such as work involving ultrahazardous or inherently dangerous activity. *Id.*

¶ 38 Here, the Board delegated its duty to safely transport Stokes County students pursuant to N.C. Gen. Stat. § 115C-253, which provides "[a]ny local board of education may . . . enter into a contract with any person, firm or corporation for the transportation . . . of pupils enrolled in the public schools." N.C. Gen. Stat. § 115C-253 (2020). Plaintiffs essentially argue the Board should be held liable in tort law despite the Board's statutory authority to delegate the transportation of its students. However, this theory of liability ignores our current independent contractor rules. There is no evidence in the record to suggest the Board retained the right to control the manner in which YVEDDI would transport students such as Lauren. YVEDDI hired and controlled the drivers, owned its own vehicles, determined its routes, and set its own policies. The Board researched and reviewed YVEDDI's reputation, safety plans, and, after contracting, provided names and addresses of students to be transported, along with bell times. Therefore, the Board did not exercise the degree of control over YVEDDI necessary to convert YVEDDI from an independent contractor to an employee.

¶ 39 Nor is there any evidence to suggest that transporting students is an ultrahazardous or inherently dangerous activity. Moreover, the statute authorizing school districts to contract for student transportation expressly indicates that this is a delegable duty. *See* N.C. Gen. Stat. § 115C-253. As this Court has previously recognized, "the administration of the public schools of the state is best left to the legislative and executive branches of government." *Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997). "[T]he courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." *Id.* Therefore, while we agree that the Board should exercise the utmost standard of care while making decisions regarding its students, we are obliged to find the Board could properly delegate any duty owed to Lauren to an independent contractor such as YVEDDI under our current law. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)).

¶ 40 Although no North Carolina court has considered whether the duty to transport students safely is delegable on these facts, other jurisdic-

tions have expressly declined to extend tort liability in circumstances where the harm occurred when the student was not in the school's physical custody. In *Chainani v. Bd. of Educ. of City of New York*, 663 N.E.2d 283, 286 (N.Y. 1995), New York's high court rejected the argument that safe transportation of students was non-delegable and held that "the schools had contracted-out responsibility for transportation, and therefore cannot be held liable on a theory that the children were in their physical custody at the time of injury." The court noted that the legislature authorized schools to contract with third parties for student transportation; thus, the school districts were "relying reasonably on the company to act responsibly in protecting the safety of the children it was charged to transport." *Id.* Similarly, in *Dixon v. Whitfield*, 654 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1995), the court observed that, given the statutes and regulations authorizing contractors to transport public school students, "the parties cite no controlling Florida authority, and we could find none in our own research, for the proposition that the safe transportation of public school students is a nondelegable duty." *Id.* The same is true in North Carolina. Absent guidance from our Supreme Court or our legislature, we must hold the Board is not an "insurer of student safety," *see Payne v. N. Carolina Dep't of Human Res.*, 95 N.C. App. 309, 313, 382 S.E.2d 449, 451 (1989), but delegated any duty it owed to Lauren pursuant to the statutory authority found in N.C. Gen. Stat. § 115C-253. In our discretion, we address the foreseeability of Lauren's injury.

¶ 41 While we are bound by our precedent and affirm the order of the trial court, we recognize there is no genuine dispute as to the foreseeability of Lauren's injury. Here, Lauren was a twenty-year-old special-needs student with an IQ of forty-one and severe diabetes. Testimony from Lauren's teacher, nurse, assistant, principal, yellow bus driver, and the superintendent demonstrates Lauren was vulnerable, immature, and susceptible to exploitation. Lauren had the functional capacity of a first-grade student and lacked the capability to comprehend and consent to the sexual acts committed against her. In addition to her mental disabilities, Lauren's diabetes and related medical care required constant adult supervision during the school day. On several occasions, while enrolled in SCS, Lauren had to go to the hospital directly from her school for medical care. It is undisputed that Lauren's intellectual disabilities and medical fragility render her highly susceptible to exploitation and harm without proper monitoring and support.

¶ 42 The Special Education environment is full of specialized customs and practices designed to provide the particular care, supervision, and protections needed to enable each individual student access to an appropriate education. Where there is an existing custom or practice in

place utilized to protect a special-needs student, it stands to reason a harm could be more likely in the absence of such a custom. *See Briggs v. Morgan*, 70 N.C. App. 57, 61, 318 S.E.2d 878, 881-82 (1984) (A customary practice "is normally relevant and admissible as an indication of what the community regards as proper" to address the risks of a particular individual. (citation omitted)). Because the Board's customary practice had been to provide transportation for Lauren on an exceptional students school bus staffed with a safety monitor, we emphasize that Lauren's injury was one that could have been prevented.

¶ 43 Absent guidance by our legislature, we are obliged to hold the trial court did not err in granting summary judgment. To hold otherwise would be to ignore the independent contractor rule, that states when an employer properly delegates a duty pursuant to a statutory authority, its duty ceases. Because we are bound by our precedent, we hold the trial court did not err in granting summary judgment.

2. Title IX.

¶ 44 **[5]** Plaintiffs further contend that the trial court erred in granting the Board's motion for summary judgment on the Board's alleged violation of Title IX. We disagree.

¶ 45 As discussed *supra*, this Court reviews an appeal from a summary judgment order *de novo*. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385. Pursuant to Rule 56 of our rules of civil procedure, summary judgment is appropriate where there is no genuine dispute of material fact. N.C. Gen. Stat. § 1A-1, Rule 56. Generally, the moving party "has the burden of demonstrating a lack of triable issues." *Monzingo*, 331 N.C. at 187, 415 S.E.2d at 344. In reviewing a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. *Id.*

¶ 46 Title IX prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. *See* 20 U.S.C. § 1681 *et seq.* Sexual harassment and abuse of a student can constitute discrimination "on the basis of sex" under Title IX. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75, 112 S. Ct. 1028, 1037, 117 L. Ed. 2d 208, 223 (1992). However, an institution such as the Board can be held liable for a Title IX violation if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination in the [institution]'s programs and fails adequately to respond. . . . [It] amount[s] to deliberate indifference to discrimination." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 1999, 141 L. Ed. 2d 277, 292 (1998).

¶ 47 The 11th Circuit Court of Appeals ("11th Circuit") found that "[t]o survive a summary judgment motion, a Title IX plaintiff must present evidence from which a reasonable jury could conclude the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination." *Hill v. Cundiff*, 797 F.3d 948, 973 (11th Cir. 2015) (internal quotation marks omitted). "The deliberate indifference standard is rigorous and hard to meet." *Id.* at 975. We find the 11th Circuit's reasoning compelling and apply its rationale in this instance.

¶ 48 In this case, Plaintiffs' Title IX claim fails because no school employee or Board member had actual knowledge of King's sexual abuse of Lauren until after he had been arrested and terminated. The undisputed evidence shows school officials learned that King had abused Lauren only after the sheriff notified Ms. Powell, who in turn, contacted the school principal. In the absence of any evidence that a school official or Board member with authority to remedy alleged discrimination had actual knowledge of King's abuse of Lauren, there is no genuine issue of material fact as to Plaintiffs' Title IX claim against the Board. Therefore, we affirm the trial court's grant of summary judgment in favor of the Board with respect to Plaintiffs' Title IX claim.

III. Conclusion

¶ 49 We hold the trial court properly dismissed Plaintiffs' claims under Section 1983 and granted summary judgment with respect to Plaintiffs' Title IX claim. Under our current tort law, and, absent any guidance from our Supreme Court and legislature, we find the trial court did not err in granting summary judgment in favor of the Board on the issue of negligence pursuant to the independent contractor rule. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judge DIETZ concurs by separate opinion.

Judge ARROWOOD concurs by separate opinion.

DIETZ, Judge, concurring by separate opinion.

¶ 50 I concur in the majority's judgment. I write separately to address two issues. First, I do not agree with the statements in the majority opinion and my concurring colleague's opinion that "there is no genuine

dispute as to the foreseeability of Lauren's injury" and that "the injury in this case was certainly foreseeable."

¶ 51 I am not prepared to hold that the felony sexual assault of a vulnerable special-needs student is always foreseeable to school officials as a matter of law. Criminal acts ordinarily are not foreseeable under tort law principles. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981). Had this claim reached a jury, the foreseeability of Lauren's injury and issues of superseding and intervening causation would have been core disputed facts to be resolved by the jury. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 237–38, 311 S.E.2d 559, 567 (1984).

¶ 52 Second, I do not agree with my concurring colleague that there are "inconsistencies . . . in the protections that are afforded to our most vulnerable children depending on whether the school system provides the transportation or contracts with a third party." The duty of care owed to Lauren and every other school student is the same whether their transportation is provided by the school itself or by a contractor who has taken on that duty. Whatever heightened level of protection the school district owed Lauren because of her special needs, the duty to provide that same level of protection passed to YVEDDI under the independent contractor rule.

ARROWOOD, Judge, concurring by separate opinion.

¶ 53 I concur in the majority opinion as being necessitated by law but write separately to express my concerns with the interaction between the statutory scheme and our caselaw. The statute authorizing delegation of the duty to transport public school students has effectively permitted boards of education to contract out of the heightened standard of care that this Court has previously held them to.

¶ 54 With respect to safeguarding public school students, this Court has held that the party charged with safeguarding our youth owes a duty of care "relative to the [victim]'s maturity[,]" specifically defining the extent of the duty required by the "foreseeability of harm to the [victim.]" *Nowlin v. Moravian Church in Am.*, 228 N.C. App. 307, 311 745 S.E.2d 51, 54 (2013) (holding that camp employees have a duty to exercise the same standard of care that a person of ordinary prudence, charged with the duty of supervising campers, would exercise under the same circumstances). Similarly, this Court held "[t]he care which a school bus driver must exercise toward a school bus passenger is proportionate to the

degree of danger inherent in the passenger's youth and inexperience." *Slade v. New Hanover Cty. Bd. of Ed.*, 10 N.C. App. 287, 295, 178 S.E.2d 316, 321 (1971). Both standards reinforce the higher standard of care owed by the governmental authority to public school students under supervision, especially in situations where a student is more vulnerable.

¶ 55 Although this standard would apply here had the van driver been directly employed by the school system, the standard does not apply in the case *sub judice* for two reasons. First is N.C. Gen. Stat. § 115C-253 (2019), which allows any board of education to delegate their duty to transport public school students to "any person, firm or corporation[.]" The second is the well-established principle in our state's tort law that generally, "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991) (citation omitted). There is an exception to this rule only for certain non-delegable duties, including ultrahazardous or inherently dangerous activity. *Id.* In this case, because transporting students to school does not qualify as an ultrahazardous or inherently dangerous activity, the exception does not apply.

¶ 56 Taken together, *Woodson* and N.C. Gen. Stat. § 115C-253 effectively eliminate the Board of Education's duty to any public student unfortunate enough to find themselves in a vehicle operated by an independent contractor. Although this Court has held the governmental authority to a higher standard of care for bus drivers employed directly by the school district, the statute relieves them of their duty without any other apparent safeguards or higher standards with respect to who may be entrusted with the duty of transporting and supervising public school students. Absent further guidance from our General Assembly, it appears the standard of care owed by the governmental authority in these contexts depends entirely on how the driver is employed.

¶ 57 As the majority pointedly notes, the injury in this case was certainly foreseeable. Public school students, particularly vulnerable students like Lauren, are inherently at greater risk of injury and are accordingly owed a higher standard of care in these contexts. This duty is originally the Board of Education's to bear.

¶ 58 Given the interplay between *Woodson* and N.C. Gen. Stat. § 115C-235, I am compelled to concur in the result, but I write to point out the inconsistencies that this result creates in the protections that are afforded to our most vulnerable children depending on whether the school system

provides the transportation or contracts with a third party. While I question whether this was the result that was intended when the statute was enacted, I see no avenue for relief from this conundrum absent legislative action or our Supreme Court's revisiting of the *Woodson* doctrine.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, DUKE ENERGY CAROLINAS LLC, AND DUKE ENERGY PROGRESS, LLC, APPELLEES

v.

CUBE YADKIN GENERATION LLC, APPELLANT

No. COA20-46

Filed 7 September 2021

Jurisdiction—public utility regulation—proposed business plan—advisory opinion—no actual controversy

Where the owner of hydroelectric generation facilities did not present a justiciable controversy when it sought a declaratory ruling from the North Carolina Utilities Commission that its proposed business plan—involving land it did not yet own and contracts it had not yet signed—fell within the landlord/tenant statutory exemption to public utility regulation, the Commission's decision stating that the owner would be subject to regulation as a public utility was vacated for being an advisory opinion.

Judge DIETZ concurring by separation opinion.

Judge JACKSON dissenting.

Appeal by Appellant from Order entered 4 September 2019 by Deputy Clerk A. Shonta Dunston in the North Carolina Utilities Commission. Heard in the Court of Appeals 29 April 2021.

The Allen Law Offices, by Dwight W. Allen, Britton H. Allen, and Brady W. Allen, and Lawrence B. Somers, Deputy General Counsel of Duke Energy Corporation, for the Appellees.

Brooks, Pierce, McLendon, Humphrey and Leonard, LLP, by Jim W. Phillips, Marcus W. Trathen, and Gisele Rankin, for the Appellant.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for amici curiae North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1 and ElectriCities of North Carolina, Inc.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason, and Michael D. Youth, for amicus curiae North Carolina Electric Membership Corporation.

McGuireWoods LLP, by Brett Breitschwerdt and Tracy S. DeMarco, for amicus curiae Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina.

GRIFFIN, Judge.

¶ 1 Appellant Cube Yadkin Generation, LLC ("Cube"), appeals from an order of the North Carolina Utilities Commission (the "Commission") declaring that Cube's proposed business plan would cause it to be a public utility subject to regulation. Cube contends the Commission erred because its proposed plan falls within the landlord/tenant exemption to public utility regulation. After careful review, we hold that Cube has failed to present a justiciable controversy and vacate the Commission's order.

I. Factual and Procedural Background

¶ 2 Cube is the owner and operator of four hydroelectric generation facilities located along the Yadkin River near Badin, North Carolina.[1] The Record shows that Cube currently operates as an exempt wholesale generator of electrical energy under a license issued by the Federal Energy Regulatory Commission. Exempt wholesale generators are not considered public-utility companies under federal law. *See* 15 U.S.C. § 79b (2021); 16 U.S.C. § 824 (2021); 18 C.F.R. § 366.1 (2021). Cube uses its hydroelectric generation facilities primarily to generate energy needed for its own internal operations and sells its entire surplus of electrical energy on the wholesale market.

¶ 3 In 2019, as part of an effort to explore additional or alternative uses for the electricity generated by its facilities,[2] Cube devised a plan to

1. Through an affiliate, Cube also owns transmission lines connecting its facilities to an electric substation located in a commercial area known as the Badin Business Park.

2. In a separate action before the Commission and this Court, Cube has also sought to sell the output of three of its four hydroelectric generation facilities to Duke Energy

redevelop an area of land in Badin known as the Badin Business Park. The Badin Business Park is a commercial area. It served as the location for a large aluminum production plant for almost 100 years prior to the plant's closure in 2007. Cube's hydroelectric generation facilities were previously used to power the aluminum production facility. Two of Cube's four facilities are located within the Badin Business Park. Cube intends to (1) purchase the Badin Business Park; (2) lease the land to prospective technology-based commercial tenants; and (3) supply electricity to those tenants by generating electricity from its own hydroelectric generation facilities located in or nearby Badin Business Park and/or by purchasing additional electricity as needed from the wholesale market (collectively, the "Proposed Plan").

¶ 4 On 8 March 2019, Cube filed a Petition for Declaratory Ruling (the "Petition") with the Commission requesting a declaration that Cube's Proposed Plan qualified for exclusion from public utility regulation under the landlord/tenant exemption in N.C. Gen. Stat. § 62-3(23)(d). Prior to filing the Petition with the Commission, Cube also presented its Proposed Plan to the Public Staff of the Commission, who expressed their support. Appellees Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC (collectively, "Duke"), requested and were allowed to intervene in the Petition proceedings. The Commission also granted a number of other local electric utility monopoly providers the right to participate in the proceedings as *amici*. On 2 May 2019, Duke and the *amici* filed motions and comments in opposition to Cube's Petition. Cube filed a reply comment on 9 May 2019.

¶ 5 On 4 September 2019, the Commission entered an Order Issuing Declaratory Ruling (the "Order") concluding "that Cube's proposed landlord/tenant arrangement . . . would cause Cube to be a public utility" and would not qualify for the landlord/tenant exemption. The Commission denied Cube's Petition with prejudice. Cube timely appealed.

II. Analysis

¶ 6 Cube contends that the Commission "erred in concluding that Cube does not qualify for the landlord-tenant exemption to 'public-utility' status" due to its misapplication of the governing law and incorrect interpretation of multiples terms or phrases used in N.C. Gen. Stat.

Progress, LLC (also a party to the current appeal), under the moniker of a qualifying facility in compliance with the Public Utility Regulatory Policies Act. *See Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, 269 N.C. App. 1, 2, 837 S.E.2d 144, 145 (2019). This matter is currently on remand to the Commission from the decision of this Court.

§ 62-3(23)(d). In response, Duke and its *amici* contend, *inter alia*, that the Commission's decision is void *ab initio* because the Commission and our Court lack jurisdiction to issue an advisory opinion where Cube has not presented an actual, justiciable controversy.

¶ 7 Cube requested that the Commission issue a declaratory judgment that its Proposed Plan fulfilled the statutory requirements to qualify for exemption from regulation as a public utility. Chapter 62 of the North Carolina General Statutes defines and prescribes the way public utilities are regulated within the state. *See* N.C. Gen. Stat. § 62-2 (2019) (explaining that the availability of electric power is a matter of public policy and vesting the Commission with authority to regulate such availability as a public utility); N.C. Gen. Stat. § 62-3(23) (2019) (defining "public utility"). Section 62-3(23)(d) exempts from the definition of a "public utility" an entity acting in a landlord/tenant relationship:

> Any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others.

N.C. Gen. Stat. § 62-3(23)(d)(4) (2019).

¶ 8 "A declaratory judgment may be used to determine the construction and validity of a statute." *Town of Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987) (citation omitted). "[A] declaratory judgment should issue '(1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.' " *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002).

¶ 9 Nonetheless, "neither the Utilities Commission nor the appellate courts of this State have the jurisdiction to review a matter which does not involve an actual controversy." *State ex rel. Utilities Comm'n v. Carolina Water Serv., Inc. of N.C.*, 149 N.C. App. 656, 657–58, 562 S.E.2d 60, 62 (2002). "To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the [petition] that litigation appears unavoidable." *Wendell v. Long*, 107 N.C. App. 80, 82–83, 418 S.E.2d 825, 826 (1992) (citations omitted). "Mere apprehension or the mere threat of an action or suit is not enough." *Id.* at 83, 418 S.E.2d at 826. A declaratory judgment is not a vehicle in which litigants may "come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) (citation omitted). Essentially, a party may only

request a judgment declaring a particular interpretation of a statute if they are "directly and adversely affected" by application of the statute to their actual circumstances. *See Byron v. Synco Properties, Inc.*, 258 N.C. App. 372, 373, 377, 813 S.E.2d 455, 457, 460 (2018) ("Landowners whose property is not directly and adversely affected by a . . . statute do not have standing to bring a declaratory judgment action to challenge the . . . interpretation of the statute.").

¶ 10 "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citation omitted). The existence of an actual controversy is a jurisdictional prerequisite to any judicial action based thereon. *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986). This Court reviews challenges to its jurisdiction *de novo* and may do so for the first time at any stage of the proceedings. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

¶ 11 Cube submitted to the Commission its Proposed Plan which purports to satisfy each of the requirements of section 62-3(23)(d). According to Cube's Petition, Cube has made "[p]reliminary contact" and entered into "active negotiations" with "a number of potential tenants[,]" with whom Cube believes "binding lease agreements *could* be reached" if it can receive a favorable declaratory ruling with respect to its Proposed Plan. (Emphasis added). However, Cube concedes that it has not yet entered into any leasing contracts creating a landlord/tenant relationship, does not currently have any ownership interest in real property in the Badin Business Park, and is not under contract to acquire any real property in Badin Business Park. It appears from the Record that Cube intends to make formal efforts to acquire the very land it intends to develop and lease only after the Commission approves of its Proposed Plan.

¶ 12 Cube has no present interest in the resolution of its question. It is not in a realized adversarial position to Duke. Cube owns and operates four hydroelectric facilities which *could* be used to provide electric energy in ways that *would* provoke an adversarial relationship with Duke. Those facilities are not currently used in those ways. Cube has no legal duties that demand it conduct acts in compliance which would unavoidably lead to litigation with Duke. Rather, Cube effectively asks this Court to serve as its general counsel, advising whether its plan to purchase real property and embark on a particular business venture is a legal use of its time and resources. *See Mears*, 231 N.C. at 117, 56 S.E.2d at 409 ("The Uniform Declaratory Judgment Act does not license litigants to

fish in judicial ponds for legal advice."). In short, the controversy that Cube has asked our Courts and the Commission to decide simply does not yet exist.

¶ 13 We note that Cube repeatedly asserts that the Public Staff of the Commission informed the Commission of its belief that Cube's Proposed Plan proffered a landlord/tenant relationship exempt from public utility regulation. However, interest and participation by the Public Staff in the resolution of a party's question does not bestow jurisdiction upon this Court. In *State ex rel. Utilities Commission v. Carolina Water Services, Inc. of North Carolina*, the Public Staff itself petitioned for a declaratory judgment that certain water service provisions in proposed contractual agreements were unenforceable; this Court nonetheless found no justiciable controversy upon which it could rule. *Carolina Water Servs.*, 149 N.C. App. at 659–60, 562 S.E.2d at 63.

¶ 14 The Dissent correctly states that litigation is not unavoidable where an impediment exists and must be removed before litigation may occur, *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 328 N.C. 557, 561, 402 S.E.2d 623, 626 (1991), but respectfully errs in reaching the conclusion that there is no impediment to future litigation in this case. According to the Dissent, "[w]ere Cube to have proceeded with negotiations with prospective tenants of the proposed full-service lease . . . , there would have been no impediment to litigation against Cube by Duke or other electric providers." This is not the case. There is no indication in the Record before this Court that Cube has the ability to purchase the Baden Business Park now or at any point in the future. Cube's inability to purchase the very land it is proposing to rent to any number of unnamed and uncertain tenants can surely be labeled an "impediment" to future litigation. Because Cube may never be able to proceed with its Proposed Plan, and has nothing binding it to moving forward on that Proposed Plan, there is "a lack of practical certainty that litigation w[ill] commence if a declaratory judgment [is] not rendered" in this case. *Am. Civ. Liberties Union of N.C., Inc., v. State*, 181 N.C. App. 430, 433, 639 S.E.2d 136, 138 (2007). Put another way, there is no certainty that Cube's position is actually adversarial to Duke's exclusive franchise service rights. Cube claims to have a roster of signable players and assuredly possesses the basketballs, the jerseys, and an itch to blow that first whistle, but will never be allowed to play against Duke if the arena owner refuses to allow Cube on the court.

¶ 15 Cube has shown no evidence that it owns the legal right to lease the real property required to fulfill its Proposed Plan, has shown no evidence that it would be able to acquire that real property, and

has presented only encouraging affirmations from potential tenants. "There is nothing to make it appear reasonably certain that if the courts agree with [Cube] and declare [its Proposed Plan exempted from regulation] that [Cube] will engage in the covered activities rather than 'put [the opinion] on ice to be used if and when occasion might arise.' " *Sharpe*, 317 N.C. at 589–90, 347 S.E.2d at 32 (quoting *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942)). We hold that Cube has failed to bring a justiciable controversy before this Court and the Commission below.

III. Conclusion

¶ 16 The Record before this Court shows that Cube failed to present the Commission with a justiciable controversy. We vacate the Commission's Order.

VACATED.

Judge DIETZ concurs by separate opinion.

Judge JACKSON dissents by separate opinion.

DIETZ, Judge, concurring.

¶ 17 The simplest way to see the flaw in my dissenting colleague's opinion is to imagine this case arriving directly at the courts, without a trip through the Utilities Commission.

¶ 18 The scenario is this: A business comes to court seeking a declaratory judgment. The business is currently in court fighting over the legality of its business model. While that suit is pending, the business comes up with an alternative idea that would permit it to abandon its first proposal in favor of a new business model. This new approach requires the business to buy land, enter into leases with other businesses, and then begin operating with the new, different business model.

¶ 19 But, the business acknowledges, it hasn't yet bought the land, it hasn't yet entered into leases with the other businesses, and it hasn't even committed to pursuing this alternative business model in lieu of its existing model.

¶ 20 The courts would not entertain a declaratory judgment action concerning the legality of this alternative proposal. The judgment would be an impermissible advisory opinion that could be "put on ice to be

used if and when occasion might arise." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 590, 347 S.E.2d 25, 32 (1986).

¶ 21 The dissent focuses on the fact that *if* Cube decides to pursue its alternative proposal, and *if* it is able to acquire the land to lease, and *if* it finds businesses who want to lease the land, then it is a "practical certainty" that Duke will challenge this business model through litigation. Thus, the dissent reasons, litigation is unavoidable. But that is true only if one ignores all the ifs.

¶ 22 Businesses routinely find themselves in this situation. They address the uncertainty by relying on the advice of legal counsel, and by drafting contracts that account for the uncertainty through contingency clauses and price concessions. They cannot force the courts to stand in as legal counsel and offer an advisory opinion that carries the force of a binding legal judgment. *Id.*

¶ 23 Nothing about this scenario changes because Cube first brought its declaratory judgment claim to the Utilities Commission instead of directly to court. To be sure, given the complexity of our utilities laws and regulatory regime, it may be good policy to permit the Commission and its staff to issue advisory rulings to firms like Cube. But that policy question is one for the General Assembly. Cube's request for declaratory relief through a judicial ruling under N.C. Gen. Stat. § 1-253 seeks an impermissible advisory opinion from the judicial branch and is not justiciable.

JACKSON, Judge, dissenting.

¶ 24 The majority holds that Cube Yadkin Generation, LLC ("Cube") has failed to present the North Carolina Utilities Commission (the "Commission") with a justiciable controversy, and consequently, it vacates the Commission's Order. I disagree, and therefore respectfully dissent.

I. Our Declaratory Judgment Act

¶ 25 North Carolina's Uniform Declaratory Judgment Act ("the Act") empowers

> [c]ourts of record within their respective jurisdictions . . . to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

N.C. Gen. Stat. § 1-253 (2019). "The essential distinction between a declaratory judgment action and any other action for relief is that a declaratory judgment action may be maintained without actual wrong or loss as its basis." *McCabe v. Dawkins*, 97 N.C. App. 447, 449, 388 S.E.2d 571, 572 (1990) (citation omitted).

> The Act recognizes the need of society for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the status quo. It satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations.

Lide v. Mears, 231 N.C. 111, 117-18, 56 S.E.2d 404, 409 (1949) (internal marks and citation omitted). "The purpose of the Act 'is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations and is to be liberally construed and administered.' " *Am. Civ. Liberties Union of N.C., Inc. v. State*, 181 N.C. App. 430, 432, 639 S.E.2d 136, 138 (2007) (quoting *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932)).

¶ 26 However, an action for a declaratory judgment must present an actual controversy for a trial court to have subject matter jurisdiction over it. *Time Warner Ent. Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 514-15, 747 S.E.2d 610, 614 (2013). While "the definition of a 'controversy' . . . depend[s] on the facts of each case, a 'mere difference of opinion between the parties' does not constitute a controversy[,]" *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (citation omitted), because "courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions[,]" *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) (citations omitted), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972). Additionally, despite sounding similar, the actual controversy

requirement under the Act is less demanding than the " 'case or controversy' requirement of Article III of the United States Constitution[.]" *Time Warner Ent. Advance/Newhouse P'ship*, 228 N.C. App. at 514-15, 747 S.E.2d at 614. *See also Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 2021-NCSC-6 ¶ 73 (2021) ("[W]here a purely statutory or common law right is at issue, . . . a showing of direct injury beyond the impairment of the common law or statutory right is not required.").

¶ 27 Generally speaking, "[t]he court has jurisdiction if the judgment will prevent future litigation." *Little*, 252 N.C. at 244, 113 S.E.2d at 701. "Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable." *Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 61. Our Supreme Court has explained that litigation is not unavoidable if "there [is] an impediment to be removed before court action c[an] be started." *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 328 N.C. 557, 561, 402 S.E.2d 623, 626 (1991). In other words, "a lack of practical certainty that litigation w[ill] commence if a declaratory judgment [is] not rendered" constitutes an impediment to litigation. *Am. Civ. Liberties Union of N.C.*, 181 N.C. App. at 434, 639 S.E.2d at 138-39. Similarly, an impediment to litigation may exist where "the action in controversy has not been performed but is merely speculative, or . . . the ordinance that is the subject of the suit has not been enacted but merely has been proposed." *Id.* at 434, 639 S.E.2d at 139 (citations omitted). However, "[w]hen no impediment is present, . . . the case is justiciable[.]" *Id.*

¶ 28 Thus, while "the Declaratory Judgment Act does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise[,]" *Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 62 (internal marks and citation omitted), or "license litigants to fish in judicial ponds for legal advice . . . [,] [it] enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment[,]" *Lide*, 231 N.C. at 117-18, 56 S.E.2d at 409.[1] Accordingly, though "[m]ere apprehension or the mere threat of an

1. The Act thus "permits the courts to review certain disputes at an earlier stage than was normally permitted at common law." *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 62 (2002). *See also McCabe v. Dawkins*, 97 N.C. App. 447, 449, 388 S.E.2d 571, 573 (1990) ("A declaratory judgment cause of action did not exist at common law because common law only redressed private wrongs and crimes.").

action or a suit is not enough" to meet the actual controversy requirement of the Act, *Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 62, "the plaintiff need not have already sustained an injury to file suit under the Act[,]" *Am. Civ. Liberties Union of N.C.*, 181 N.C. App. at 433, 639 S.E.2d at 138.

II. Standard of Review

¶ 29 The actual controversy requirement under the Act is an issue of subject matter jurisdiction. *Time Warner Ent. Advance/Newhouse P'ship*, 228 N.C. App. at 514, 747 S.E.2d at 614. Subject matter jurisdiction is "reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

III. The Justiciability of Cube's Petition

¶ 30 I would hold that Cube's petition presented a justiciable controversy—namely, the issue of whether the full-service lease proposed by Cube, without any usage charge for electricity, would be a sale of electricity within the meaning of Chapter 62 of our General Statutes. Specifically, the justiciable controversy presented by Cube's petition was whether Cube's plan for providing tenants with electricity generated from its own hydroelectric generation facilities located in or nearby the Business Park or obtaining additional electricity to provide to tenants at the Business Park under a full-service lease would qualify Cube for exclusion from public utility regulation under the landlord/tenant exemption contained in N.C. Gen. Stat. § 62-3(23)d. As the Public Staff of the Commission noted in its 9 May 2019 Reply Comments, "[t]he positions taken by Duke and other electric providers make clear that if Cube were to enter leases consistent with its proposal in the absence of a declaratory ruling in its favor, it would likely face legal action by Duke and other parties. A declaratory judgment will enable the parties to enter contracts and make investments without the uncertainty posed by future litigation."

¶ 31 Were Cube to have proceeded with negotiations with prospective tenants of the proposed full-service lease rather than first seek a declaratory judgment from the Commission that the full-service lease fell within the landlord/tenant exemption contained in N.C. Gen. Stat. § 62-3(23)d, there would have been no impediment to litigation against Cube by Duke or other electric providers: (1) Cube owns the hydroelectric generation facilities at issue and 17 miles of transmission lines that interconnect the

hydroelectric facilities with the electric grid and an electric substation at the Business Park; (2) Duke has exclusive franchise service rights under N.C. Gen. Stat. § 62-110 in the geographic area at issue; (3) Duke promptly filed petitions to intervene in Cube's action after learning of it; and (4) Duke thereafter formally opposed the action and moved for its dismissal. Indeed, I conclude that based on the pleadings and record in this case there is a practical certainty Duke would have commenced litigation against Cube if Cube had obtained site control of the Business Park and entered leases with tenants there consistent with the terms of the proposed full-service lease rather first seeking a declaratory judgment from the Commission. After all, this matter involved investments of potentially tens of millions of dollars. A decision in Cube's favor would allow it to move forward with the proposal and a decision against it would mean it could move in another direction, without the need to spend further time or money on this proposal. I would therefore hold that Cube's petition presented a justiciable controversy. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JARED WADE FLANAGAN, DEFENDANT

No. COA20-577

Filed 7 September 2021

Probation and Parole—jurisdiction—superior court—appeal from district court—revocation of probation—waiver of revocation hearing

The superior court lacked jurisdiction to hear defendant's appeal from the district court's orders revoking his probation for various misdemeanor offenses, where defendant waived his revocation hearing and admitted to violating the conditions of his probation. Importantly, N.C.G.S. § 15A-1347(b) precludes appeal of a sentence reactivation to the superior court where the defendant waives a revocation hearing.

Appeal by Defendant from judgments entered 5 February 2020 by Judge Angela B. Puckett in Stokes County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Jason Christopher Yoder, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Jared Flanagan ("Defendant") appeals from judgments of the trial court revoking his probation for various misdemeanor offenses. Defendant's notice of appeal failed to comport with Rule 4 of our rules of appellate procedure, and he asks this Court to allow his petition for writ of certiorari ("PWC") to reach the merits of his appeal. Defendant seeks our review of the revocation order, because the trial court failed to find good cause to revoke his probation. After careful review, we find the Stokes County Superior Court lacked jurisdiction to hear Defendant's appeal. Thus, we grant Defendant's PWC and vacate the judgment of the Stokes County Superior Court and reinstate the judgment of the Stokes County District Court.

I. Background

¶ 2 On July 19, 2018, Defendant pleaded guilty in Forsyth County District Court to first-degree trespass and larceny (file no. 17 CR 60920). The trial court sentenced Defendant to one hundred twenty days in the custody of the Misdemeanant Confinement Program,[1] suspended for twelve months of supervised probation. On August 24, 2018, Defendant pleaded guilty to possession of drug paraphernalia (file no. 18 CR 56369). The trial court sentenced Defendant to one hundred twenty days in the custody of the Misdemeanant Confinement Program, suspended for twelve months of supervised probation and ordered as a special condition of his probation that Defendant report for initial evaluation for a substance abuse assessment. On October 23, 2018, Defendant pleaded guilty to felony larceny (file no. 17 CR 61748). Defendant was sentenced to sixty days in the Forsyth County Jail, suspended for twelve months of supervised probation and ordered as a special condition of probation to serve ten days in the Forsyth County Jail.

¶ 3 On December 7, 2018, while subject to the restrictions of his probation, Defendant tested positive for opiates. On December 23, 2018,

1. The Misdemeanant Confinement Program, administered by the North Carolina Sheriff's Association, houses all misdemeanants and people convicted of drunk driving at county jails that have voluntarily agreed to participate in the program. https://www.doc.state.nc.us/jr/misdemeanors.html.

Defendant was charged in Forsyth County with second-degree trespass and misdemeanor larceny. On December 28, 2018, Defendant was charged with two counts of shoplifting concealment of goods. On January 3 and 17, 2019, Defendant failed to report to Treatment Accountability for Safer Communities care management services in violation of the terms of his probation. As a result, Defendant was terminated from the program. Defendant also failed to attend a scheduled appointment with Daymark Recovery Services for substance abuse services. Defendant failed to report to the Forsyth County Jail to serve his special condition of probation as ordered by the trial court on weekends in November and December 2018 and January 4, 2019. Defendant's probation officer, Tiffany Lynch ("PO Lynch"), testified Defendant had only completed four days of his special condition of probation as of the date of his revocation hearing.

¶ 4 PO Lynch filed violation reports in Stokes County District Court alleging that Defendant violated his probation in file nos. 19 CR 17-19 (the "misdemeanor cases") by committing new criminal offenses on January 18, 2019. The violation report gave notice of a revocation hearing scheduled on March 4, 2019. Two days later, Defendant stole multiple items from a Walmart in Stokes County. On April 1, 2019, Defendant failed to appear for a scheduled court date and also failed to report for a scheduled office visit with PO Lynch.

¶ 5 On April 3, 2019, a law enforcement officer stopped Defendant and his vehicle in Forsyth County for a traffic violation. Following that traffic stop, Defendant was arrested on multiple charges because he was found to be in possession of drug paraphernalia; tried to strike an officer with his vehicle; obstructed the investigation by driving away; drove without a driver's license and while displaying a license plate registered for another vehicle; drove recklessly, failed to maintain lane control, failed to stop at a stop sign; failed to wear a seat belt; and fled in his vehicle to elude arrest.

¶ 6 The following day, PO Lynch filed additional probation violation reports alleging Defendant absconded supervision, failed to report to PO Lynch, and committed new criminal offenses. PO Lynch also alleged that, during the April 3, 2019 incident, Defendant was using heroin in a Winston-Salem park and that he "is a danger to himself and the community."

¶ 7 On October 22, 2019, Defendant pleaded guilty in Stokes County Superior Court to felony larceny from a merchant and to misdemeanor larceny (19 CRS 50404-05). The trial court sentenced Defendant to

a minimum of nine, maximum of twenty months in custody, suspended for eighteen months of supervised probation. On October 29, 2019, Defendant pleaded guilty in Forsyth County Superior Court to attempted assault with a deadly weapon on a government official and resisting a public officer (19 CRS 53256); driving while license revoked and reckless driving (19 CRS 53257); possession of drug paraphernalia (19 CRS 53262); and fleeing to elude arrest with a motor vehicle (19 CRS 53263). The trial court sentenced Defendant to a minimum of fifteen, maximum of twenty-seven months, suspended for a term of thirty-six months of supervised probation.

¶ 8 Defendant failed to report to PO Lynch in Stokes County or his Forsyth County Courtesy Officer for his November 14, 2019 appointment. PO Lynch reported Defendant told his Forsyth County Courtesy Officer that he would be unable to attend his November 14, 2019 appointment with the Forsyth County Courtesy Officer because he was working out of town. However, around November 15, 2019, Defendant was charged in Forsyth County with misdemeanor larceny at a Walmart. His presence at Walmart was a violation of a prior court order prohibiting Defendant from being on the premises of any Walmart. On November 22, 2019, Defendant was charged in Stokes County with resisting a public officer.

¶ 9 On December 2, 2019, Defendant appeared before the Stokes County District Court for a hearing on the January 18, and April 4, 2019 violation reports. While in the Stokes County District Court, Defendant both waived his violation hearing and admitted he violated the conditions of his probation. That same day, the Stokes County District Court entered orders revoking Defendant's probation and activating the suspended sentences in the misdemeanor cases. The trial court imposed his sentence of one hundred twenty days in the Misdemeanant Confinement Program and gave him credit for ninety-two days of prior confinement; his sentence of one hundred twenty days in the Misdemeanant Confinement Program; and his consecutive sentence of sixty days in the Stokes County Jail. After learning his probation was being revoked, Defendant ran out of the courtroom, was quickly apprehended in the courthouse, and ordered to serve thirty days in jail for criminal contempt of court. Defendant gave notice of appeal to the Stokes County Superior Court.

¶ 10 On December 23, 2019, PO Lynch filed violation reports in the Stokes County Superior Court, alleging that Defendant had violated the terms of his probation in file nos. 19 CRS 50404-05, and in 19 CRS 053256-57 and 19 CRS 053262-63 (renamed in Stokes County as file no. 19 CRS 459). The report gave notice of a hearing scheduled for February 5, 2020.

¶ 11 On February 5, 2020, Defendant appeared before the Stokes County Superior Court. At the hearing, Defendant admitted to willfully violating his probation as alleged in the violation reports in the Superior Court probation files. The Stokes County Superior Court found Defendant had violated his probation and entered five judgments revoking Defendant's probation and activating his suspended sentences in the misdemeanor cases, and in 19 CRS 50404-05 and 19 CRS 459 (the felony cases). On February 11, 2020, Defendant filed written notice of appeal regarding the misdemeanor cases and the felony cases.[2] The misdemeanor cases are the only cases currently before us.

¶ 12 On August 10, 2020, Defendant filed a PWC with this Court. Defendant filed a PWC because his appeal failed to "identify the '[C]ourt to which appeal is taken.' " N.C. R. App. P. 4(b). Because Defendant failed to comply with Rule 4 of our rules of appellate procedure, Defendant asks this Court to exercise its discretion and issue a writ of certiorari to permit appellate review. In our discretion, we allow the petition to consider the merits of Defendant's appeal.

II. Discussion

¶ 13 At the outset, we must first determine whether the Stokes County Superior Court possessed jurisdiction to hear Defendant's appeal from the Stokes County District Court. The question of whether a superior court has appellate jurisdiction over a district court's revocation of probation and subsequent activation of a sentence when the defendant has waived his revocation hearing is an issue of first impression before this Court.

¶ 14 The right to appeal in a criminal case is "purely a creation of state statute." *State v. Pennell*, 228 N.C. App. 708, 710, 746 S.E.2d 431, 433 (2013) (quoting *State v. Singleton*, 201 N.C. App. 620, 623, 689 S.E.2d 562, 564 (2010)), *rev'd in part*, 367 N.C. 466, 758 S.E.2d 383 (92014). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*,

2. While Defendant appealed in the Stokes County Superior Court on February 11, 2020, his notice of appeal failed to designate a court from which his appeal is taken pursuant to Rule 4 of our rules of appellate procedure. Defendant filed a PWC with this Court, seeking our review of the revocation of his probation for his misdemeanor offenses. As Defendant did not argue the trial court impermissibly revoked his felony probation in his appellate briefing, we need not address this issue. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975)).

¶ 15 Concerning jurisdiction over probational matters, the ability of a court "to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (quoting *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005)). We are guided by N.C. Gen. Stat. § 15A-1347 which states in relevant part,

> (a) [W]hen a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing . . . .
>
> (b) If a defendant waives a revocation hearing, the finding of a violation of probation, activation of sentence, or imposition of special probation *may not* be appealed to the superior court.

N.C. Gen. Stat. § 15A-1347(a)-(b) (2021) (emphasis added).

¶ 16 Following from the plain language of Section 15A-1347(b) is the conclusion that the superior court may not hear an appeal from the district court concerning the activation of a sentence, special probation imposition, or finding of a probation violation if the defendant waived a revocation hearing. *See id.* The direct result of Section 15A-1347(b) is that the superior courts' jurisdiction is limited by a defendant's action in the district court. If a defendant chooses to waive his revocation hearing, then the natural consequence proscribed by Section 15A-1347(b) is that the defendant may not thereafter appeal his special probation imposition, sentence activation, or finding of violation of probation by the district court to the superior court. To accept such an appeal would cause the superior court to act in excess of its jurisdictional boundaries imposed by the General Assembly in Section 15A-1347(b).

¶ 17 Here, Defendant both waived his violation hearing and admitted to violating the conditions of his probation during his December 2, 2019 Stokes County District Court hearing. After the District Court revoked Defendant's probation and activated his sentence, Defendant appealed to the Stokes County Superior Court. Despite Defendant's waiver of his violation hearing in the District Court, the Stokes County Superior Court heard Defendant's appeal on February 5, 2020. Since we have determined that Section 15A-1347(b) precludes appeal to the superior court

when a defendant waives his revocation hearing, we that hold that the Stokes County Superior Court lacked jurisdiction to hear Defendant's appeal. To hold otherwise would permit the Superior Court to exceed its jurisdiction and operate beyond the jurisdictional boundaries established by our General Assembly.

¶ 18 Although we have yet to consider Section 15A-1347(b) as a jurisdictional bar, we turn to relevant case law for further guidance in reaching our decision. In *State v. Miller*, our Supreme Court explained because the ability to suspend a sentence is favorable to the defendant, when the defendant "sits by as the order is entered and does not then appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence." 225 N.C. 213, 215, 34 S.E.2d 143, 145 (1945). The defendant would thus "commit[] himself to abide by the stipulated conditions [and] . . . may not be heard thereafter to complain that his conviction was not in accord with due process of law." *Id*. In *State v. Smith*, our Supreme Court reasoned because the defendant did not object when the condition was implemented, his conduct "impliedly consented thereto and [he] committed himself to abide by the terms of the probation." 233 N.C. 68, 70, 62 S.E.2d 495, 496 (1950).

¶ 19 Naturally flowing from our Supreme Court cases is the proposition that when a defendant assents during a conviction, he generally may not later appeal on the basis of that to which he previously assented. In the present case, Defendant assented to waiving the violation hearing and admitted violating the conditions of his probation. Defendant in no way contested the charges against him. Defendant's waiver of his violation hearing precludes him from appealing to the Superior Court from the results that flow from Section 15A-1347(b), including the activation of his suspended sentence.

¶ 20 Next, concerning revocation hearings in *State v. Romero*, we held because "Defendant did not contest the validity of the community service requirement at any point during the revocation hearing," the defendant had "waived this challenge." 228 N.C. App. 348, 351-52, 745 S.E.2d 364, 367 (2013). Similarly, in *State v. Tozzi*, we held a defendant cannot for the first time bring an objection to his probation on appeal but "must first object no later than the revocation hearing." 84 N.C. App. 517, 520, 353 S.E.2d 250, 252 (1987). Here, Defendant's waiver of his revocation hearing means he did not contest or object to the alleged violations of his probation. Thus, under Section 15A-1347(b), Defendant lost the right to appeal the District Court's finding of a violation of probation, special probation sentence, or an activation of his sentences.

¶ 21 The Stokes County Superior Court did not have jurisdiction to hear Defendant's appeal from the Stokes County District Court. The language of Section 15A-1347(b) clearly states that a waiver of a revocation hearing and subsequent finding of violation of probation, activation of a sentence, or imposition of a special probation precludes an appeal to the superior court. Because Defendant waived his revocation hearing in the Stokes County District Court then appealed the District Court's revocation and suspension activation to Stokes County Superior Court, the Superior Court was barred by N.C. Gen. Stat. § 15A-1347(b) from hearing Defendant's appeal.

¶ 22 Defendant asks us to consider whether the trial court erred by holding a revocation hearing after the expiration of Defendant's probation without first making a finding of fact that the State had shown good cause for the probation hearing. We need not consider the merits of this argument because N.C. Gen. Stat. § 15A-1347(b) prohibited Defendant from appealing the Stokes County District Court decision to activate Defendant's sentence to the Stokes County Superior Court.

III. Conclusion

¶ 23 The decision of the Stokes County Superior Court is vacated, and the judgment of the Stokes County District Court is reinstated.

VACATED.

Judges INMAN and GRIFFIN concur.

STATE v. GUERRERO

[279 N.C. App. 236, 2021-NCCOA-457]

STATE OF NORTH CAROLINA
v.
PAYTON B. GUERRERO, DEFENDANT

No. COA20-722

Filed 7 September 2021

1. Motor Vehicles—impaired driving—specific jury instruction—chemical analysis results—as proof of alcohol concentration

In a prosecution for impaired driving, where the trial court instructed the jury that the "results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration," the court did not err by denying defendant's request for a special jury instruction clarifying that this statement merely explains the standard for prima facie evidence of a person's alcohol concentration and does not create a legal presumption of defendant's guilt. The court adequately conveyed the substance of defendant's requested instruction by instructing the jurors that they were "the sole judges of the weight to be given to any evidence," that they "should consider all the evidence," and that it was their "duty to find the facts and to render a verdict reflecting the truth."

2. Sentencing—impaired driving—mitigating factors—statutory step-by-step formula—prejudice analysis

At a sentencing hearing for an impaired driving conviction, where defendant argued that three mitigating factors under N.C.G.S. § 20-179 existed but where the trial court only found one mitigating factor, the court erred by not finding one of the other factors (that defendant had a safe driving record) where defendant met his burden of proving that factor by a preponderance of the evidence. However, this error did not prejudice defendant because it did not cause the court to enter a sentence in excess of the presumptive term; rather, because the court determined under section 20-179's step-by-step formula that any mitigating factor substantially outweighed any aggravating factors, it was statutorily required to impose a Level Five punishment.

3. Sentencing—presumption of regularity—severity of sentence—no improper considerations

At the sentencing phase of an impaired driving prosecution, where defendant's sentence fit within the statutory limit and was therefore presumptively regular and valid, defendant could not overcome the presumption of regularity by showing that the trial

court sentenced him more harshly for exercising his right to a jury trial or that it improperly based the sentence on uncharged criminal conduct. Although the court stated that it would give defendant the same sentence he received in his prior trial (for the same charge) if he wanted to "accept responsibility," the court also said that its job was not to punish defendant for rejecting a plea offer but to be fair and impartial. Additionally, defendant did not assert his Fifth Amendment privilege, object, or ask to speak with his attorney when the court questioned him about his prior illegal drug use.

Appeal by Defendant from judgment entered 16 December 2019 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle McCullen, for the State.

John P. O'Hale for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Payton B. Guerrero appeals from a judgment entered after a jury found him guilty of impaired driving. Defendant argues that the trial court erred by (1) denying Defendant's request for a special jury instruction; (2) failing to find two statutorily mandated mitigating factors; and (3) sentencing Defendant more harshly for exercising his right to a jury trial. We conclude that Defendant received a fair trial, free from reversible error.

I. Factual and Procedural History

¶ 2 On 15 December 2018, a North Carolina State Highway Patrol trooper placed Defendant under arrest for driving while impaired. The trooper took Defendant to the Johnston County Jail where Defendant provided a breath sample to be analyzed by the Intoximeter EC/IR II. The Intoximeter reported an alcohol concentration of 0.09.

¶ 3 Defendant pled not guilty to impaired driving in Johnston County District Court. Following a bench trial, the judge found Defendant guilty of impaired driving and imposed a Level Five sentence pursuant to N.C. Gen. Stat. § 20-179. Defendant gave notice of appeal in open court.

¶ 4 The case was called for trial in Johnston County Superior Court. Defendant submitted a request for the following special jury instruction:

> I instruct you, ladies and gentlemen of the jury, that phrase "once it is determined that the chemical analysis of the defendant's breath was performed in accordance with the applicable rules and regulations, then a reading of 0.08 or more grams of alcohol per 210 liters of breath constitutes reliable evidence and is sufficient to satisfy the State's burden of proof as to this element of the offense of DWI" is a statement of the standard for prima facie evidence of a person's alcohol concentration sufficient to submit the case to the jury for its consideration. This statement does not create a legal presumption of the defendant's alcohol concentration or the defendant's guilt. As I have earlier instructed you what, if anything, the evidence tends to show, is for you, the members of the jury, to determine.

The trial judge denied Defendant's request for the special jury instruction and delivered the following Pattern Instruction to the jury:

> [D]efendant has been charged with impaired driving. For you to find [D]efendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that [D]efendant was driving a vehicle; second, that [D]efendant was driving that vehicle upon a highway or street within the state . . .[;] and third, at the time [D]efendant was driving that vehicle, [D]efendant had . . . consumed sufficient alcohol that at any relevant time after the driving [D]efendant had an alcohol concentration of 0.08 or more grams of alcohol per . . . 210 liters of breath. A relevant time is any time after the driving that the driver still has in the body alcohol consumed before or during the driving. The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.

Additionally, the judge instructed the jurors that (1) they "are the sole judges of the weight to be given to any evidence"; (2) they "should weigh all the evidence in the case"; (3) they "should consider all the evidence"; and (4) "it is [their] duty to find the facts and to render a verdict reflecting the truth." The jury found Defendant guilty of impaired driving.

¶ 5 The judge held a sentencing hearing after the jury returned its verdict. The judge did not find any aggravating factors. Defendant argued for three statutorily mandated mitigating factors: (1) Defendant had a slight impairment of his faculties resulting solely from alcohol, and Defendant's alcohol concentration did not exceed 0.09 at any relevant time after the driving; (2) Defendant had a safe driving record; and (3) Defendant voluntarily submitted himself to a mental health facility for assessment and had voluntarily participated in all treatment recommended by such facility. Defendant submitted his driving record and substance abuse assessment to the court without objection from the State. Defendant did not submit proof that he voluntarily participated in the Alcohol Drug Education Traffic School ("ADETS") program recommended by his substance abuse assessment.

¶ 6 During the sentencing hearing, the judge stated,

> I spoke to the attorneys, and I made an overture, and I said, [b]ased on the evidence, I'll give you the same thing that Judge Willis gave you, if you want to accept responsibility and move forward. Mr. O'Hale said, Judge, he has a right to a trial. And I said, I know. But I wanted to make sure that if we could work this out, because I said, with the number, there's a strong possibility this jury will come back with a guilty plea – a guilty verdict. I mean, jurors hear numbers. Now, one of the things about at the superior court level, my job is not to punish you because you didn't take an offer. That's not what it's about. My job is to be fair and impartial, as I'm always going to be.

The judge subsequently asked Defendant,

> [L]et me ask you. You need to tell me the truth on this. Don't lie to me. If I have you tested today, what are you going to test illegal for? If it's marijuana or something like that, just tell me the truth now. Don't lie. Because if I have you tested and you lie, I'm going to hold you in contempt and give you 30 days. What will you test positive for if I test you today?
>
> DEFENDANT: Just marijuana.

Defendant did not assert his Fifth Amendment privilege or object when the judge questioned him about his prior drug use. Counsel for Defendant was present, but Defendant did not ask to speak with his attorney and did not have any conference with counsel.

¶ 7 The judge ultimately found one mitigating factor: that Defendant had a slight impairment of his faculties resulting solely from alcohol, and Defendant's alcohol concentration did not exceed 0.09 at any relevant time after the driving. He imposed a Level Five sentence. The judge sentenced Defendant to sixty days in jail and suspended the sentence. The judge placed Defendant on twelve months of supervised probation, "having received evidence and having found as fact that supervision is necessary." The special conditions of probation ordered that Defendant surrender his driver's license, complete twenty-four hours of community service within 180 days of the probation period, attend two Narcotics or Alcohol Anonymous classes per week, be tested for illegal substances thirty days from the sentencing date, and "remain on probation for the entire 12 [months]."

II. Analysis

¶ 8 Defendant argues that the trial court erred by (1) denying Defendant's request for a special jury instruction; (2) failing to find two statutory mitigating factors; and (3) sentencing Defendant more harshly for exercising his right to a jury trial.

A. Jury Instruction

¶ 9 **[1]** Defendant argues that the trial court erred by "not instructing the jury on . . . how to fully evaluate the State's Intoximeter evidence." Defendant claims the Pattern Instruction did not allow the jury an "adequate opportunity to fully weigh" the Intoximeter evidence "from the point of view of [Defendant's]'s theory of the case." We disagree.

> When a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.

Calhoun v. State Highway and Pub. Works Comm'n, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935). Thus, "[a] specific jury instruction should be given when '(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.' " *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting

Liborio v. King, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002)). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Id.*

¶ 10 In North Carolina, "[a] person commits the offense of impaired driving" when the individual

> drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration.

N.C. Gen. Stat. § 20-138.1(a)(2) (2019). The phrase "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" is a "statement of the standard for prima facie evidence of a person's alcohol concentration" and "does not create a legal presumption" or "prejudice to the defendant." *State v. Narron*, 193 N.C. App. 76, 84–85, 666 S.E.2d 860, 865–66 (2008) (internal marks omitted). Instead, "[t]he statute simply authorizes the jury to find that the report is what it purports to be—the results of a chemical analysis showing the defendant's alcohol concentration." *Id.* at 84, 666 S.E.2d at 866.

¶ 11 Similarly, the North Carolina Supreme Court has held that the pattern jury instruction's language stating the results of a chemical analysis shall be "deemed sufficient evidence to prove a person's alcohol concentration[,]" and the language "adequately convey[s] the substance of [the] defendant's requested instructions" when additional language explains that the jurors are "the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness" and "that if they decided that certain evidence was believable, they must then determine the importance of that evidence in light of all other believable evidence in the case." *State v. Godwin*, 369 N.C. 604, 614–15, 800 S.E.2d 47, 53–54 (2017) (internal quotation marks omitted).

¶ 12 In *State v. Beck*, this Court held that instructing the jury that "(1) it was the 'sole judge[] of the weight to be given [to] any evidence'; (2) it was the jury's 'duty to decide from [the] evidence what the facts are'; (3) the jury 'should weigh all the evidence in the case'; and (4) the jury 'should consider all of the evidence' " lets the jury know "that it possesse[s] the authority to determine the weight of any evidence offered to show that the [d]efendant was—or was not—impaired."

State v. Beck, 233 N.C. App. 168, 172, 756 S.E.2d 80, 83 (2014). Thus, statements such as these "signal[] to the jury that it [is] free to analyze and weigh the effect of the breathalyzer evidence along with all the evidence presented during the trial." *Godwin*, at 614, 800 S.E.2d at 54.

¶ 13 In the present case, the trial court's instruction, "in its entirety . . . encompass[es] the substance of the law requested." *Outlaw*, 190 N.C. App. at 243, 660 S.E.2d at 559. Further, the trial judge instructed the jurors that (1) they "are the sole judges of the weight to be given to any evidence"; (2) they "should weigh all the evidence in the case"; (3) they "should consider all the evidence"; and (4) "it is [their] duty to find the facts and to render a verdict reflecting the truth." The jury was not misled. As in *Godwin* and *Beck*, these statements "signaled to the jury that [they were] free to analyze and weigh the effect of the [Intoximeter] evidence along with all the evidence presented during the trial." *Godwin*, at 614, 800 S.E.2d at 54.

B. Mitigating Factors

¶ 14 **[2]** Defendant argues that the trial court erred by failing to find two statutory mitigating factors. Defendant argues this error is prejudicial because he received supervised probation as part of his sentence. We disagree.

¶ 15 N.C. Gen. Stat. § 20-179 governs the sentencing of defendants convicted of impaired driving. *State v. Geisslercrain*, 233 N.C. App. 186, 190, 756 S.E.2d 92, 95 (2014). "[A] defendant's sentencing range under N.C. Gen. Stat. § 20-179 is determined by the existence and balancing of aggravating and mitigating factors," *id.*, and once a defendant is convicted for impaired driving, "the judge shall hold a sentencing hearing to determine whether there are aggravating or mitigating factors that affect the sentence to be imposed." N.C. Gen. Stat. § 20-179(a) (2019). "The offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 20-179(a)(1) (2019). "The sentencing judge is required to find a statutory factor when the evidence in support of it is uncontradicted, substantial, and manifestly credible." *State v. Cameron*, 314 N.C. 516, 520, 335 S.E.2d 9, 11 (1985). "[W]henever there is error in a sentencing judge's failure to find a statutory mitigating circumstance *and* a sentence in excess of the presumptive term is imposed, the matter must be remanded for a new sentencing hearing." *State v. Daniel*, 319 N.C. 308, 315, 354 S.E.2d 216, 220 (1987) (emphasis added).

¶ 16 "Under [N.C. Gen. Stat.] § 20-179, there are six sentencing ranges." *Geisslercrain*, 233 N.C. App. at 190, 756 S.E.2d at 95. "[T]he trial court

is afforded much less discretion in sentencing under N.C. Gen. Stat. § 20-179 than under the Structured Sentencing Act." *Id.* "The statutes governing [impaired driving] sentencing are quite systematic and tiered, thus leaving little room to exercise discretion." *State v. Weaver*, 91 N.C. App. 413, 415–16, 371 S.E.2d 759, 760 (1988).

> [T]he process resembles "pigeonholing" as the statutes supply the trial judge with the step-by-step formula; i.e., to review the evidence, to determine whether the evidence supports the factors listed in gross aggravation, aggravation, or mitigation, to weigh the factors supported by the evidence, and to determine the level of punishment.

Id. at 416, 371 S.E.2d at 760. "[I]f the trial court determines that [t]he mitigating factors substantially outweigh any aggravating factors, the trial court *must* impose a Level Five punishment." *Geisslercrain*, 233 N.C. App. at 191, 756 S.E.2d at 95 (internal quotation marks omitted); N.C. Gen. Stat. § 20-179(f)(3) (2019). Level Five is the minimum sentencing level that a defendant can statutorily receive for impaired driving. N.C. Gen. Stat. §§ 20-179(f3)–(k) (2019). A Level Five sentence permits that a defendant

> may be fined up to two hundred dollars [] and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant: (1) Be imprisoned for a term of 24 hours as a condition of special probation; or (2) Perform community service for a term of 24 hours; or . . . (4) Any of these conditions.

N.C. Gen. Stat. § 20-179(k) (2019). Additionally, a defendant may be placed on probation as part of a Level Five sentence. *Id.* ("If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by [N.C. Gen. Stat. §] 20-17.6 for the restoration of a drivers license and as a condition of probation."). The General Assembly has provided trial courts a great deal of discretion in choosing the appropriate punishment within Level Five, including the choice between supervised and unsupervised probation. N.C. Gen. Stat. §§ 20-179(k), (r).

¶ 17 In this case, Defendant did not establish the first mitigating factor he argues for: that Defendant voluntarily submitted himself to a mental health facility for assessment and has voluntarily participated in any treatment recommended by such facility. No evidence in the record shows that Defendant voluntarily participated in the ADETS treatment recommended by his substance abuse assessment.

¶ 18 As to the second mitigating factor—that Defendant had a safe driving record—we hold that Defendant met his burden of proof "by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 20-179(a)(1). Defendant submitted his driving record to the court without objection from the State. "[T]he evidence in support of [this factor was] uncontradicted, substantial, and manifestly credible." *Cameron*, 314 N.C. at 520, 335 S.E.2d at 11. Therefore, the trial judge erred by failing to find this statutory factor.

¶ 19 However, the trial judge did not impose "a sentence in excess of the presumptive term." *Daniel*, 319 N.C. at 315, 354 S.E.2d at 220. Using the "step-by-step formula" under the impaired driving sentencing statutes, the trial judge "determine[d] that [t]he mitigating factors substantially outweigh[ed] any aggravating factors," so, the judge imposed a Level Five punishment under N.C. Gen. Stat. § 20-179. *Weaver*, 91 N.C. App. at 416, 371 S.E.2d at 760; *Geisslercrain*, 233 N.C. App. at 191, 756 S.E.2d at 95 (internal quotation marks omitted); N.C. Gen. Stat. § 20-179(f)(3).

¶ 20 Even if the trial judge had found the two additional mitigating factors, the judge could not have sentenced Defendant at a lower sentencing level under the "systematic and tiered" impaired driving statutes. *Weaver*, 91 N.C. App. at 415–16, 371 S.E.2d at 760. Defendant's Level Five sentence, including probation, was allowed under the impaired driving statutes. N.C. Gen. Stat. § 20-179(k). Accordingly, Defendant cannot establish that he was prejudiced by the trial court's failure to find his safe driving record as a mitigating factor.

¶ 21 It is important to emphasize that trial courts are mandated by N.C. Gen. Stat. § 20-179(e) to determine whether statutory mitigating factors are apparent before imposing a sentence: "The judge shall . . . determine before sentencing under subsection (f) of this section whether any of the mitigating factors listed [in subsection (e)] apply to the defendant." N.C. Gen. Stat. § 20-179(e) (2019). Prior to sentencing, the trial judge stated, "[M]y hands are tied. I do have to find the mitigating factors. You're right. And I respect that, and I'm going to find that mitigating factors exist." Instead, the judge only found one mitigating factor in writing: slight impairment of Defendant's faculties. Moreover, the judge

did not orally state his findings regarding this factor or any other factor in mitigation before pronouncing Defendant's sentence. Although the judge repeatedly spoke of his "responsibility" as superior to the "objectives" of the litigants before the court, the judge did not fulfill his statutorily mandated responsibility to find mitigating factors. This is despite the fact that evidence supporting the mitigating factor was "uncontradicted, substantial, and manifestly credible." *Cameron*, 314 N.C. at 520, 335 S.E.2d at 11.

¶ 22 Although we discern no reversible error, it is important for trial judges to follow through with their responsibility to determine mitigating factors orally and in writing before imposing a sentence. Aside from being mandated by statute, this responsibility is integral to promoting our courts' interests in procedural fairness, transparency, and respect for litigants before the court.

C. Constitutional Error

¶ 23 **[3]** Defendant contends that the trial court erred by sentencing Defendant more harshly because (1) Defendant exercised his right to a trial by jury, and (2) "the trial court relied on . . . uncharged criminal conduct not found by the jury." Defendant claims his arguments are evidenced by the trial judge stating the following:

> Now, as I said in chambers, I have no qualm saying it here, I spoke to the attorneys, and I made an overture, and I said, [b]ased on the evidence, I'll give you the same thing that Judge Willis gave you, if you want to accept responsibility and move forward. Mr. O'Hale said, Judge, he has a right to a trial. And I said, I know. But I wanted to make sure that if we could work this out, because I said, with the number, there's a strong possibility this jury will come back with a guilty plea – a guilty verdict. I mean, jurors hear numbers. Now, one of the things about at the superior court level, my job is not to punish you because you didn't take an offer. That's not what it's about. My job is to be fair and impartial, as I'm always going to be.

The judge continued speaking to Defendant:

> THE COURT: [L]et me ask you. You need to tell me the truth on this. Don't lie to me. If I have you tested today, what are you going to test illegal for? If it's marijuana or something like that, just tell me the

> truth now. Don't lie. Because if I have you tested and you lie, I'm going to hold you in contempt and give you 30 days. What will you test positive for if I test you today?
>
> DEFENDANT: Just marijuana.

We disagree with Defendant's two arguments.

¶ 24 "The standard of review for questions concerning constitutional rights is *de novo*." *State v. Fernandez*, 256 N.C. App. 539, 544 808 S.E.2d 362, 367 (2017). Further, "[t]he extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to de novo review." *State v. Johnson*, 265 N.C. App. 85, 87, 827 S.E.2d 139, 141 (2019).

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C. Gen. Stat. § 15A-1340.12 (2019). "[I]n determining the sentence to be imposed, the trial judge may consider such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant." *Johnson*, 265 N.C. App. at 87–88, 827 S.E.2d at 141. "Such an inquiry is needed if the imposition of the criminal sanction is to best serve the goals of the substantive criminal law." *State v. Smith*, 300 N.C. 71, 82, 265 S.E.2d 164, 171 (1980) (finding that the trial judge's questions to the defendant about his prior criminal record was appropriate and that the defendant's failure to object or assert his Fifth Amendment privilege amounted to a waiver on appeal).

¶ 25 "The trial judge may also take into account the seriousness of a particular offense when exercising its discretion to decide the minimum term to impose within the presumptive range." *Johnson*, 265 N.C. App. at 88, 827 S.E.2d at 141. "While a sentence within the statutory limit will be presumed regular and valid, such a presumption is not conclusive." *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987). "If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regulari-

ty is overcome, and the sentence is in violation of defendant's rights." *Id.* "A criminal defendant may not be punished at sentencing for exercising [his] constitutional right to trial by jury." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990); *see also Johnson*, 265 N.C. App. at 88, 827 S.E.2d at 141 ("[O]ur Courts have held it is improper during sentencing for a trial judge to consider a defendant's refusal to accept a plea offer.").

> Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because [the] defendant did not agree to a plea offer by the state and insisted on a trial by jury, [the] defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

State v. Tice, 191 N.C. App. 506, 511–12, 664 S.E.2d 368, 372 (2008) (quoting *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990)).

¶ 26 "The trial de novo represents a completely fresh determination of guilt or innocence." *State v. Butts*, 22 N.C. App. 504, 506, 206 S.E.2d 806, 808 (1974) (quoting *Colten v. Kentucky*, 407 U.S. 104, 117 (1972)).

> [U]nless it affirmatively appears that a second sentence has been increased to penalize a defendant for exercising rights accorded him by the constitution, a statute, or judicial decision, a longer sentence does not impose an unreasonable condition upon the exercise of those rights nor does it deprive him of due process. The presumption is that the judge has acted with the proper motive and that he has not violated his oath of office.

State v. Stafford, 274 N.C. 519, 531, 164 S.E.2d 371, 380 (1968). "The burden is on the defendant to overcome the presumption that a court acted with proper motivation in imposing a more severe sentence." *State v. Daughtry*, 61 N.C. App. 320, 324, 300 S.E.2d 719, 721 (1983).

¶ 27 As to Defendant's first argument, Defendant's Level Five punishment fit within the statutory limit and is "presumed regular and valid." N.C. Gen. Stat. § 20-179(k) (2019); *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681. Defendant has not overcome the "presumption of regularity" by showing that "the court considered irrelevant and improper matter[s] in determining the severity of the sentence." *Id.*, 360 S.E.2d at 681. The trial judge did reference a chambers conversation where he stated he would give Defendant the same punishment as the district court judge

if Defendant "want[ed] to accept responsibility and move forward." However, the judge went on to say the following in the sentencing hearing: "[n]ow, one of the things about at the superior court level, my job is not to punish you because you didn't take an offer. That's not what it's about. My job is to be fair and impartial, as I'm always going to be." It cannot be reasonably "inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer." *Tice*, 191 N.C. App. at 511–12, 664 S.E.2d at 372 (citation omitted).

¶ 28 Further, the judge stated:

> This was not an accident . . . I saw the video. I heard what the man said. When you hit his car, he went down the embankment. You're lucky you didn't kill somebody. See that's what I think is missing here. You think it's just an accident . . . it might have appeared like an accident, but you could have killed somebody. That's no joke. So slight impairment, substance abuse assessment, safe driving record, polite and cooperative, you could have killed that man. He went down an embankment. You could have killed him. You could have killed yourself.

Taking "into account the seriousness of" the impaired driving offense is within the judge's discretion during sentencing. *Johnson*, 265 N.C. App. at 88, 827 S.E.2d at 141. Defendant has not met his burden to overcome the presumption "that the judge has acted with the proper motive and that he has not violated his oath of office." *Stafford*, 274 N.C. at 531, 164 S.E.2d at 380.

¶ 29 Defendant's second argument also fails. Defendant did not assert his Fifth Amendment privilege or object when the judge questioned him about his previous drug use. Defendant had counsel present, but Defendant did not ask to speak with his attorney nor did he conference with counsel. Defendant waived his Fifth Amendment argument for appeal. *Smith*, 300 N.C. at 82, 265 S.E.2d at 171.

III. Conclusion

¶ 30 We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

STATE v. TARLTON

[279 N.C. App. 249, 2021-NCCOA-458]

STATE OF NORTH CAROLINA
v.
JODY ALLEN TARLTON, DEFENDANT

No. COA20-100

Filed 7 September 2021

1. Appeal and Error—preservation of issues—fatal variance between indictment and evidence—motion to dismiss based on sufficiency of evidence

In a drug prosecution, without deciding whether defendant's motion to dismiss for insufficient evidence was adequate to preserve for appellate review his argument that a fatal variance existed between the indictment that charged defendant with resisting a public officer and the evidence presented, the Court of Appeals employed de novo rather than plain error review to resolve the fatal variance issue.

2. Indictment and Information—fatal variance—resisting a public officer—basis for arrest immaterial

In a drug prosecution, there was no fatal variance between the indictment charging defendant with resisting a public officer, which stated defendant was being arrested for processing narcotics, and the evidence at trial, which showed defendant was found to possess marijuana before he ran away from officers, because the specific basis for the arrest was not an essential element of the offense and was therefore immaterial. The evidence identifying the officer's official duty as lawfully trying to take defendant into custody—an essential element—conformed to the allegations in the indictment.

Appeal by defendant from judgment entered 7 August 2019 by Judge Kevin M. Bridges in Superior Court, Union County. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander H. Ward, for the State.

Jarvis John Edgerton, IV, for defendant.

STROUD, Chief Judge.

¶ 1 Jody Allen Tarlton ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of possession with intent to sell and deliver methamphetamine, possession of heroin, misdemeanor possession of marijuana, possession of drug paraphernalia, resisting a public officer, and attaining habitual felon status. Defendant argues that the trial court erred in denying his motion to dismiss the charge of resisting a public officer because there was a fatal variance between the indictment and the evidence introduced at trial. Because the evidence at trial conformed to the allegations in the indictment as to the essential elements of the crime of resisting a public officer, we conclude there was no error.

I. Background

¶ 2 The State's evidence tended to show that on 15 May 2018 at approximately 10:00 A.M., Detective David Todd Haigler of the Monroe Police Department received a phone call from a confidential informant. The confidential informant said Defendant—a white male carrying a "blue/black/gray camo in color book bag" and wearing blue jeans and a hat—would be at the Citgo Station on East Roosevelt Boulevard with "a significant amount of methamphetamine in [his] book bag." Along with Sergeant Nick Brummer and Officer Travis Furr, Detective Haigler drove to the Citgo Station, where he "observed a white male matching the description . . . [who] had in his possession a camo book bag that was also described to [him] by the confidential informant." For approximately twenty minutes, the officers watched Defendant as he stood outside the store.

¶ 3 When Sergeant Brummer and Detective Haigler got out of their vehicles and approached Defendant, he was "sitting down[;] he had a bag with him[;] and he had a knife on his side." Sergeant Brummer testified that he asked Defendant "if he had anything on him that [the officers] needed to know about and [Defendant] said just a little bud in his pocket." After asking Defendant to turn around and place his hands on the wall, Detective Haigler retrieved marijuana from Defendant's pocket. At that point, Officer Furr testified that he "grabbed the camouflage bag that was laying in between [Defendant's] feet on the ground" and carried it to Detective Haigler's vehicle.

¶ 4 After taking Defendant's knife, Sergeant Brummer asked Defendant if he could search his book bag. Defendant explained that "he got the book bag from a male subject in the parking lot" and pointed toward the parking lot. Detective Haigler testified that when he looked in the direction that Defendant was pointing, Defendant "took off running." Upon hearing Sergeant Brummer yell "get him," Officer Furr left

Defendant's book bag on the police vehicle and joined Detective Haigler and Sergeant Brummer's foot pursuit of Defendant. They apprehended Defendant within one minute.

¶ 5 At trial, Defendant stipulated that his book bag contained 11.49 grams of methamphetamine and less than .1 grams of heroin. At the close of the State's evidence, Defendant moved to dismiss and "grant acquittals to [Defendant] on all the charges with which he's currently related, recognizing the State has dismissed two of those from the very start." The trial court denied the motion. Defendant renewed his motion to dismiss the charges at the close of all the evidence, and the trial court again denied the motion. The jury returned verdicts finding Defendant guilty of all charges. Defendant was sentenced to two consecutive judgments and commitments for a total minimum of 178 months and a total maximum of 238 months imprisonment. Defendant appeals.

II. Analysis

¶ 6 Defendant argues that "the trial court erred when it denied Defendant's motion to dismiss the charge for resisting a public officer because there was a fatal variance between the indictment allegation and the evidence." (Original in all caps.)

A. Preservation

¶ 7 **[1]** The State argues that Defendant did not preserve his fatal variance argument for appellate review because "[t]his Court has repeatedly held that in order to preserve a fatal variance argument for appellate review, a defendant must specifically state at trial that a fatal variance is the basis for his motion to dismiss." Defendant, citing *State v. Smith*, 375 N.C. 224, 846 S.E.2d 492 (2020), asserts that his "fatal variance argument here is preserved for normal appellate review upon his timely motions to dismiss all charges."

¶ 8 In *State v. Smith*, 375 N.C. 224, 846 S.E.2d 492, the defendant was charged with two counts of engaging in sexual activity with a student in violation of North Carolina General Statute § 14-27.7. *Id.* at 226, 846 S.E.2d at 493. At trial, the defendant moved to dismiss the charge based on insufficient evidence of one element of the crime—whether sexual activity occurred—and the trial court denied the motion. *Id.* at 226–27, 846 S.E.2d at 493. In his appeal to this Court, the defendant argued the trial court erred in denying his motion to dismiss because (1) "the evidence at trial did not establish that he was a 'teacher' within the meaning of N.C.G.S. § 14-27.7(b)" or, in the alternative, (2) "there was a fatal variance between the indictment and proof at trial since the indictment

alleged defendant was a 'teacher,' but his status as a substitute teacher made him 'school personnel' under section 14-27.7(b)." *Id.* at 227–28, 846 S.E.2d at 494. This Court held that the defendant failed to preserve these arguments for appellate review because the insufficient evidence argument at trial was limited to a single element of the crime, and the fatal variance argument was not presented to the trial court. *Id.* at 228, 846 S.E.2d at 494.

¶ 9 On appeal, the Supreme Court acknowledged this Court's opinion was filed before the Supreme Court's opinion in *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020), which "addressed the specific issue of when a motion to dismiss preserves all sufficiency of the evidence issues for appellate review." *Id.* at 228–29, 846 S.E.2d at 494. In *Golder*, the Supreme Court "held that 'Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time.' " *Id.* at 229, 846 S.E.2d at 494 (quoting *Golder*, 374 N.C. at 246, 839 S.E.2d at 788). Based on its holding in *Golder*, the Court in *Smith* explained, "[b]ecause defendant here made a general motion to dismiss at the appropriate time and renewed that motion to dismiss at the close of all the evidence, his motion properly preserved all sufficiency of the evidence issues." *Id.* at 229, 846 S.E.2d at 494. The Supreme Court did not conclusively determine whether the defendant's fatal variance argument was preserved for appellate review; the Court stated, "assuming without deciding that defendant's fatal variance argument was preserved, defendant's argument would not prevail for the same reasoning." *Id.* at 231, 846 S.E.2d at 496.

¶ 10 Following *Golder* and *Smith*, this Court recently addressed whether a fatal variance argument was preserved for appellate review:

> Although *Golder* did not address this specific question, our Court has noted, in light of *Golder*: "any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." We further reasoned: "our Supreme Court made clear in *Golder* that 'moving to dismiss at the proper time . . . preserves all issues related to the sufficiency of the evidence for appellate review.' " Specifically, in *Gettleman* we determined the defendant failed to preserve an argument that the jury instructions and indictment in that case created a fatal variance precisely because the Defendant failed to move to dismiss the charge in question. Here, unlike in *Gettleman*, Defendant did timely move to dismiss all

> charges, and thus, under the rationale of *Gettleman*, it would appear Defendant did preserve this argument. Without so deciding, and for purposes of review of this case, we employ de novo review.

State v. Brantley-Phillips, 278 N.C. App. 279, No. 2021-NCCOA-307, ¶ 22 (citations and brackets omitted) (quoting *State v. Gettleman*, 275 N.C. App. 260, 271, 853, S.E.2d 447, 454 (2020)).

¶ 11 Here, Defendant moved to dismiss his charges at the close of the State's evidence and renewed the motion at the close of all the evidence. Therefore, as in *Brantley-Phillips*, "it would appear Defendant did preserve this argument" but, "[w]ithout so deciding, and for purposes of review of this case, we employ de novo review." *Id.*

B. Fatal Variance

¶ 12 **[2]** Defendant argues there was a fatal variance between the indictment charging him with resisting a public officer and the evidence presented at trial. Specifically, the indictment alleged that at the time of Defendant's resistance, Detective Haigler was "attempting to take the defendant into custody for processing narcotics" but the evidence at trial "only showed that Defendant ran from officers, including Haigler, after a small amount of marijuana was seized from his person." Defendant asserts he "is entitled to have his resisting conviction vacated because the State tendered no evidence supporting its material indictment allegation that Defendant resisted an arrest for processing narcotics."

> A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.
>
> In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to the gist of the offense.

State v. Pickens, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citations, quotation marks, and brackets omitted). "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted).

> The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) [e]nsuring that the defendant is able to prepare his defense against the crime with which he is charged and (2) protecting the defendant from another prosecution for the same incident. However, *a variance does not require reversal unless the defendant is prejudiced as a result*.

State v. Glidewell, 255 N.C. App. 110, 113, 804 S.E.2d 228, 232 (2017) (emphasis added) (citations, quotation marks, brackets, and ellipses omitted).

¶ 13 Defendant was charged with resisting, delaying, or obstructing a public officer under North Carolina General Statute § 14-223, which makes it a misdemeanor to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office[.]" N.C. Gen. Stat. § 14-223 (2019). "[O]ur Supreme Court has determined a warrant or bill of indictment must identify the officer—the person alleged to have been resisted, delayed or obstructed—by name; *indicate the official duty he was discharging or attempting to discharge*; and should point out, generally, the manner in which the defendant is charged with having resisted, delayed, or obstructed the officer." *State v. Nickens*, 262 N.C. App. 353, 360, 821 S.E.2d 864, 871 (2018) (emphasis added) (citations omitted). Here, the indictment for resisting a public officer alleged that Defendant "unlawfully and willfully did":

> resist, delay and obstruct Detective D. Haigler, a public officer holding the office of Monroe Police Department, by fleeing on foot to avoid arrest. At the time, the officer was discharging and attempting to discharge a duty of his office, attempting to take the defendant into custody for processing narcotics.

¶ 14 According to Defendant, the "basis for the arrest, as alleged in the indictment, is a material element of the charge[,]" and, therefore, any variance in the basis for the arrest between the evidence at trial and the allegation in the indictment would be material and fatal. However, Defendant does not cite, and our research has not revealed, *any* case that holds the specific basis for arrest is an essential element of the charge of resisting a public officer. It is well-established that an essential element of the charge of resisting a public officer is the identification of the official duty an officer was discharging or attempting to discharge at the time of a defendant's resistance. *See id.*; *State v. Swift*, 105 N.C.

App. 550, 553, 414 S.E.2d 65, 67 (1992). Indeed, this Court has explained that "[i]n the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and *the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense*[.]" *State v. Kirby*, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325 (1972) (third emphasis added).

¶ 15 Here, the indictment alleged that at the time of Defendant's resistance, Detective Haigler was engaged in the duty of "attempting to take the defendant into custody for processing narcotics." The identification of Detective Haigler's official duty—attempting to take Defendant into custody—is an essential element of resisting a public officer. *See Nickens*, 262 N.C. App. at 360, 821 S.E.2d at 871; *Kirby*, 15 N.C. App. at 488, 190 S.E.2d at 325. At trial, law enforcement officers testified that before his arrest, Defendant admitted to having "just a little bud in his pocket," which the officers subsequently retrieved. Defendant does not contend that the officers acted unlawfully in attempting to take him into custody or that his arrest was unlawful. The State presented evidence that Defendant's arrest was lawful, as Detective Haigler had probable cause to arrest Defendant for possession of marijuana when Defendant started to run away. Therefore, the allegation in the indictment which identified Detective Haigler's official duty as attempting to take Defendant into custody conformed to the evidence actually presented at trial.

¶ 16 This Court has explained:

> The bill is complete without evidentiary matters descriptive of the manner and means by which the offense was committed. A verdict of guilty, or not guilty, is only as to the offense charged, not of surplus or evidential matters alleged. *An averment in an indictment or warrant not necessary in charging the offense may be treated as exceeding what is requisite and should be disregarded.* We find it unnecessary to pass upon the effect of the evidential matters charged, therefore. *The evidence corresponded with the allegations of the indictment which were essential and material to charge the offense.* The judge in turn did an adequate job of clarifying the issues, and of eliminating extraneous matters, as was his duty.

State v. Lewis, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982) (emphasis added) (citations and quotation marks committed). Here,

the specific basis for Defendant's arrest was "[a]n averment . . . exceeding what is requisite and should be disregarded." *Id.* It is immaterial whether the arrest was based on processing narcotics or possession of marijuana because the State's evidence demonstrated that at the time of Defendant's resistance, Detective Haigler was *lawfully* attempting to arrest Defendant. Defendant does not argue that his arrest was not lawful because there was no probable cause to arrest him for possession of marijuana. The fact that the evidence at trial did not show that Detective Haigler arrested Defendant for the specific basis of processing narcotics did not hinder Defendant from preparing a defense nor did it leave him vulnerable to the same charges being brought against him. Defendant also does not argue that he was prejudiced because the evidence at trial tended to show that he was arrested for possession of marijuana. During the charge conference, Defendant asked the trial court to change the jury instruction for resisting a public officer to reflect that the official duty "was attempting to take the Defendant into custody for possessing controlled substances, to wit, marijuana, which is a duty of a detective." Defendant rejected the court's proposal to instruct the jury that Defendant was taken into custody for "possessing a controlled substance" and specifically requested the court "put marijuana in" the instruction because "that's consistent with the testimony of both officers."

¶ 17 Defendant asserts this case "is analogous" to *State v. Carter*, 237 N.C. App. 274, 765 S.E.2d 56 (2014). In *Carter*, after a confidential source made a controlled purchase of drugs at the defendant's house, deputies obtained a search warrant for the defendant's person and house. *Id.* at 276, 765 S.E.2d at 59. On the way to the defendant's house to execute the search warrant, a deputy observed the defendant in the passenger seat of a passing car and initiated a stop. *Id.* The deputy approached the passenger side of the car, informed the defendant he was the named subject of the search warrant, and ordered the defendant to step out of the car and submit to a search. *Id.* at 276–77, 765 S.E.2d at 59. When the defendant refused to exit the car, the deputy radioed for backup and informed the defendant he was under arrest. *Id.* at 277, 765 S.E.2d at 59. The defendant was subsequently charged and convicted of resisting a public officer and appealed. *Id.* at 277, 765 S.E.2d at 59.

¶ 18 On appeal, the defendant argued that the trial court erred in denying his motion to dismiss the charge of resisting a public officer because there was insufficient evidence that the deputy was discharging or attempting to discharge a duty of his office—executing a search warrant—in a lawful manner at the time the defendant resisted. *Id.* at 276, 765

S.E.2d at 58. This Court agreed with the defendant, held that the deputy violated North Carolina General Statute § 15A–252 (providing the statutory requirements for an officer intending to execute a search warrant), and "[c]onsequently, [the deputy] was not lawfully executing the warrant, and [the] defendant had a right to resist him." *Id.* at 280, 765 S.E.2d at 61. Explaining "[t]he basis for the charge of resisting a public officer was defendant's refusal to get out of the car and submit to a search of his person[,]" this Court held that "the legality of the stop has no bearing on the legality of Investigator Burns' conduct in executing the search warrant." *Id.*

¶ 19 Defendant asserts "[i]n the instant case, just as in *Carter*, the State's evidence is insufficient to show Defendant violated the particular offense the State alleged in its indictment." However, *Carter* is inapposite, and Defendant's characterization is misleading. First, there was no fatal variance or other indictment issue raised in *Carter*. The term "indictment" is not referenced at all in the *Carter* decision. In *Carter*, we addressed the sufficiency of the evidence pertaining to the lawfulness of the official duty being performed—the execution of the search warrant—which is an essential element of the crime of resisting a public officer. Here, however, Defendant does not challenge the sufficiency of the evidence regarding the legality of the official duty being performed—attempting to take the defendant into custody—but instead argues there was insufficient evidence he was arrested *for processing narcotics*. However, as discussed above, the basis of the arrest is "an averment unnecessary to charge the offense," which "may be disregarded as inconsequential surplusage." *State v. Grady*, 136 N.C. App. 394, 396–97, 524 S.E.2d 75, 77 (2000). As a result, there was no fatal variance between the indictment and the evidence presented, as "[t]he evidence corresponded with the allegations of the indictment which were essential and material to charge the offense." *Lewis*, 58 N.C. App. at 354, 293 S.E.2d at 642.

III. Conclusion

¶ 20 We hold that the evidence at trial conformed to the allegations in the indictment as to the essential elements of the crime of resisting a public officer.

NO ERROR.

Judges ARROWOOD and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 SEPTEMBER 2021)

BARRIER v. CITY OF KANNAPOLIS 2021-NCCOA-459 No. 20-592	N.C. Industrial Commission (17-807422)	Affirmed in Part, Remanded in Part.
EPES LOGISTICS SERVS., INC. v. MARCUSLUND 2021-NCCOA-460 No. 20-338	Guilford (19CVS8889)	Affirmed
IN RE A.P. 2021-NCCOA-461 No. 21-36	Orange (19JA25)	Affirmed
IN RE D.R. 2021-NCCOA-462 No. 21-148	Moore (20JA63)	Affirmed
IN RE H.M. 2021-NCCOA-463 No. 21-173	Mecklenburg (20JA237-239)	Affirmed
IN RE J.A.H. 2021-NCCOA-464 No. 20-600	Iredell (19JB53)	Affirmed
IN RE L.T.B. 2021-NCCOA-465 No. 21-124	Pitt (16JB188)	Affirmed In Part; Vacated In Part And Remanded.
IN RE R.W. 2021-NCCOA-466 No. 21-107	Alamance (19JA112) (19JA113)	Affirmed
McCARTER v. N.C. BD. OF LICENSED PRO. COUNS. 2021-NCCOA-467 No. 20-584	Gaston (19CVS535)	REVERSED AND REMANDED WITH INSTRUCTIONS
SMITH v. NOVANT HEALTH, INC. 2021-NCCOA-468 No. 19-859	Forsyth (16CVS5181) (16CVS5182)	Affirmed in Part, Remanded in Part

STATE v. ALLAMADANI 2021-NCCOA-469 No. 20-752	Guilford (17CRS67374) (18CRS66199) (18CRS66622) (18CRS81632) (18CRS81636) (19CRS25443) (19CRS25584) (19CRS25591-95) (19CRS66455) (19CRS70510) (19CRS71794) (19CRS79925) (19CRS81545)	Vacated and Remanded
STATE v. ALLEN 2021-NCCOA-470 No. 20-468	Avery (18CRS306) (18CRS50212-15) (18CRS50230)	Vacated and Remanded
STATE v. BECKWITH 2021-NCCOA-471 No. 20-437	Beaufort (17CRS50395-400)	No Error
STATE v. CHAMBERLIN 2021-NCCOA-472 No. 20-651	Lee (18CRS50509)	No Error.
STATE v. DAVIS 2021-NCCOA-473 No. 20-445	New Hanover (18CRS51367)	No Error
STATE v. DILLARD 2021-NCCOA-474 No. 20-602	Forsyth (18CRS57884) (18CRS58396-97)	No error; dismissed in part.
STATE v. HERNANDEZ 2021-NCCOA-475 No. 20-583	Lincoln (18CRS51953) (18CRS51954) (18CRS51959)	NO PLAIN ERROR; REMANDED TO CORRECT CLERICAL ERROR
STATE v. HERR 2021-NCCOA-476 No. 20-723	Rockingham (11CRS52900) (11CRS52904) (14CRS51578)	Affirmed
STATE v. JOYNER 2021-NCCOA-477 No. 20-156	Iredell (13CRS52197-98) (19CRS42)	No Error

STATE v. McKOY 2021-NCCOA-478 No. 20-627	Duplin (18CRS50621-22)	No Error
STATE v. MOORE 2021-NCCOA-479 No. 20-416	Gaston (15CRS52842-43)	Affirmed
STATE v. NIVENS 2021-NCCOA-480 No. 20-344	Cabarrus (18CRS54382-84)	Reversed and Remanded in part; No Error in part.
STATE v. PETERSON 2021-NCCOA-481 No. 20-571	Pender (17CRS51309)	No Error
STATE v. SCHMIDT 2021-NCCOA-482 No. 20-661	Randolph (18CRS52687)	VACATED IN PART; NO ERROR IN PART
STATE v. SHUFORD 2021-NCCOA-483 No. 20-744	Catawba (18CRS55537) (18CRS55539) (19CRS435)	No Error In Part; Vacated In Part And Remanded For Resentencing.
WELLER v. JACKSON 2021-NCCOA-484 No. 21-80	Onslow (20CVD1371)	Reversed
ZIMMERMAN v. ZIMMERMAN 2021-NCCOA-485 No. 20-785	Randolph (17CVD2295)	Affirmed in part, Vacated in part and Remanded

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